# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1979

**No. 79-97**

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,
a California corporation,
*Petitioner*

vs.

MIDCAL ALUMINUM, INC., a California corporation,
*Respondent*

BAXTER RICE as Director of the Department of Alcoholic Beverage Control of the State of California,
*Respondent*

## PETITIONER'S REPLY BRIEF

LAW OFFICES OF
WILLIAM T. CHIDLAW
A PROFESSIONAL CORPORATION
Point West Executive Centre
1455 Response Road, Suite 191
Sacramento, California 95815
Telephone: (916) 920-0202
*Attorney for Petitioner*

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

## SUBJECT INDEX

SUBJECT INDEX





TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED





TABLE OF AUTHORITIES CITED

# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1979

**No. 79-97**

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,
a California corporation,
*Petitioner*

VS.

MIDCAL ALUMINUM, INC., a California corporation,
*Respondent*

BAXTER RICE as Director of the Department of Alcoholic Beverage Control of the State of California,
*Respondent*

## PETITIONER'S REPLY BRIEF

### I

### SUMMARY OF PETITIONER'S ARGUMENT IN REPLY

The wholesale distributor for Gallo Wine in southern California, an affiliate of the wine producer Gallo Wine Company, referred to as Midcal throughout this proceeding, in urging this Court to reconsider its order allowing the California Attorney General to file an amicus curiae brief and present oral argument, raised a "suggestion of mootness." In ruling on that motion, this Court deferred the "suggestion of mootness" . . . "to the hearing of the case on the merits. . . ."

Midcal contends that a California Court of Appeal case, *Capiscean,* (Pet. for Cert., Ex. D), declared the regulatory

provisions directly involved in this review to be invalid at *both* the wholesale to retail and retail to consumer level. It then argues that since the Department was a party to that case, and the case has become final, the Department is "collaterally estopped" from defending this case and thus, so Midcal's reasoning goes, the matter is now "moot".

Factually, the *Capiscean* case involved only retail to consumer wine minimum prices, whereas the instant case involves factually only wholesale to retail minimum wine prices, and thus there is no basis for Midcal's argument. Furthermore, under California law, a public official cannot be "collaterally estopped" from enforcing a state statute of the nature involved in this proceeding.

Midcal did not raise any such question in the court below. Neither did it raise this question in its Brief in Opposition to the Petition for Certiorari before this Court.

In the same vein, Midcal also apparently argues that there is no enforcement in California of the wholesale to retail wine minimum prices, and suggests that therefore any decision by this Court would be merely an "advisory opinion." This contention is likewise without merit.

This proceeding commenced in California by an accusation against Midcal charging it with violating the wine minimum price provisions involved in this case in two respects:

(1) Selling wine to retailers where no price had been posted with the Department, and

(2) Selling wine to a retailer at prices below the prices posted with the Department.



Midcal stipulated to the facts and accepted the imposition of a penalty subject to a "judicial determination." Thereafter, Midcal filed an original proceeding in the Court of Appeal, seeking an interpretation of the validity of the provisions involved under the *Rice (Corsetti)* case, and seeking to restrain the Department from enforcing the provisions.

Petitioner sought leave to intervene based on the fact that a declaration of invalidity of these provisions would directly affect the interests of its members in being protected against discrimination by wholesalers and unfair competition by other retailers. The intervention was granted and the Petitioner became a party to the proceedings.

The Court of Appeal, feeling itself bound to follow the *Rice (Corsetti)* decision of the California Supreme Court, declared the provisions invalid. A petition for rehearing was denied before that court, and a petition for hearing was denied by the California Supreme Court.

Thereafter, a Petition for Writ of Certiorari was sought from this Court by the Petitioner. After the Petition was granted by this Court, the Department at first determined to participate in the proceeding, and then determined to remain "neutral" feeling itself bound by the decision of the "highest court of the state" [*Rice (Corsetti)*]. However, the Department did state to this Court that it "would comply fully" with the decision of this Court.

Although the Court of Appeal decision ordered the issuance of a peremptory writ of mandate directing the Department to cease enforcement of the provisions involved,

it nevertheless granted a stay of its decision pending a review by this Court.

In the meantime, the Department has continued to enforce the wholesale to retail price posting provisions for wine that are involved in this litigation, although apparently enforcement of the minimum retail to consumer prices for wine has ceased pursuant to the *Capiscean* decision.

Assuming that the decision of this Court upholds the validity of the California regulatory provisions, a reversal of the instant case will result in the California Court of Appeal reversing its order to the Department to cease enforcement, and will cause the penalty to be imposed upon Midcal for its violation of the California law. Thus the decision of this Court in this case will not be an "advisory opinion."

Midcal also argues that the California Legislature has "refused" to enact any liquor price provisions and therefore apparently would ask this Court to conclude that California has somehow abandoned its regulation of prices for liquor. This contention is likewise in error. The Legislature has not repealed the two wine statutes involved directly in this litigation, nor has it repealed the minimum price statute relating to distilled spirits directly involved in the *Rice (Corsetti)* case. Furthermore, contrary to Midcal's assertions, the Legislature has taken no action on any statutory provisions relating to price in the liquor field.

There are also some allusions to the position of the California Governor. There appears to be no support in



any of the materials before this Court, whether they be properly within the record or otherwise, for any position of the Governor, even if that were relevant. Consequently, no comment would seem to be required in that respect.

In summary, there is no merit to Midcal's argument regarding a "collateral estoppel" or a "suggestion of mootness" and it should be rejected.

A discussion of the Wilson and Webb-Kenyon Acts is said by Midcal to not be properly before this Court based on its contention that these Acts were not "properly" presented in the Court below, and that such consideration is not included in the "Questions Presented" to this Court. Suffice it to say that Petitioner did in fact discuss the Webb-Kenyon Act in the court below and did in fact include references to the Wilson and Webb-Kenyon Acts in three different places in its Petition for Certiorari herein.

Although it is true that in the "Questions Presented" the Wilson and Webb-Kenyon Acts were not specifically referred to, it would seem that a discussion of the legislative enactments relating to the inter-relationship of the federal and state governments with regard to the regulation of liquor which predated and led up to the ratification of the Twenty-first Amendment would be reasonably included in a discussion as to the effect to be given to the Twenty-first Amendment. This would seem to be especially true when the Webb-Kenyon Act is said to have been "constitutionalized" by the Twenty-first Amendment. Additionally, although the point would seem to be irrelevant in view of the facts, this Court, on its own motion, could allow such a consideration. It is likewise urged that this contention of

Midcal be rejected and that this Court do in fact consider all necessary factors in order to reach the proper decision in this case.

In its Opening Brief, Petitioner discussed the various cases of this Court, and several others, which have clearly outlined the power of the states to regulate liquor within their borders "unfettered by the Commerce Clause" and presented an analysis, albeit not original, of the several areas where the states' power to regulate liquor under the Commerce Clause has been limited. Petitioner discussed the due process and equal protection exceptions illustrated by *Craig v. Boren,* 429 U.S. 190, and *Wisconsin v. Constantineau,* 400 U.S. 433; Petitioner discussed cases which dealt with extra-territorial effects of state liquor regulatory provisions, such as *U.S. v. Frankfort Distilleries,* 324 U.S. 293, and *Seagram & Sons v. Hostetter,* 384 U.S. 35; Petitioner likewise dealt with questions of foreign commerce as illustrated by the case of *Hostetter v. Idlewild Liquor Corp.,* 377 U.S. 324; Petitioner also discussed the exception relating to federal enclaves and military installations as illustrated by the case of *Collins v. Yosemite Park & Curry Co.,* 304 U.S. 518.

Petitioner pointed out that the California Supreme Court in *Rice (Corsetti)* had misinterpreted the various cases and had mistaken the exceptions where other constitutional provisions were involved and where foreign commerce was involved as somehow limiting the state when the regulatory provision involved only a potential conflict with the Commerce Clause itself. Out of this misconception by the California Supreme Court as to the effect of these



exception cases, the California Supreme Court evolved a "balancing of the interests" rule to be applied to apparently all state regulatory provisions regarding liquor within a state's borders where anti-competitive behavior under a state statute is compelled. The test evolved by the California Supreme Court is patently without support by any precedent of this Court, is a substitution of the wisdom of the court for that of the Legislature, would require that the interpretation of the scope of the Twenty-first Amendment proceed on a case-by-case basis, and all in all would present an unworkable situation.

Both Midcal and the United States seemingly approve the rationale of the *Rice (Corsetti)* case, but apparently recognizing its invalidity under the cases decided by this Court, do not attempt to support it by, for instance, disputing Petitioner's position as to the meaning of the phrase "unfettered by the Commerce Clause" and the proper analysis of the several cases that have in fact restricted the state's power under the Twenty-first Amendment because of potential conflict with other sections of the Constitution.

Now, for the first time, Midcal argues for what it deems to be a literal interpretation of § 2 of the Twenty-first Amendment. It argues that under that Amendment the states only have the power to regulate liquor in connection with its importation and in that regard may only either prohibit it altogether or place restrictions on its importation. It is not clear from reading Midcal's Brief what power, if any, the state has beyond this control over importation, the only clear contention being that any state regulatory provision relating to liquor within the state's border that conflicts with the Sherman Act is invalid. Mid-

cal is unable to cite any authority in the form of decisions of this Court to support this new interpretation of the Twenty-first Amendment. Indeed, to the best of Petitioner's knowledge, there are none. There are, in fact, a number of decisions of this Court in which state regulatory provisions relating to liquor within the borders of a state have been upheld as valid enactments under the Twenty-first Amendment.

The United States likewise urges a new approach to the interpretation of the Twenty-first Amendment, but unlike Midcal would remove any vestige of meaning from that Amendment by having this Court interpret a state regulatory provision enacted pursuant to the Twenty-first Amendment to be subject to the Supremacy Clause, and thus any Act of Congress under the Commerce Clause would "pre-empt" it. The United States cites no authority for the proposition that the Supremacy Clause subordinates the Twenty-first Amendment to the Commerce Clause, nor indeed is there any. The contention is without merit.

The Supremacy Clause itself contains the answer to that contention in its very language where it provides that the "Constitution . . . shall be the supreme law of the land . . ." Since the Twenty-first Amendment is a part of the Constitution, and since state regulatory provisions enacted pursuant to the Twenty-first Amendment have been held to be "unfettered by the Commerce Clause", it is illogical to argue that any congressional enactment under the Commerce Clause would "pre-empt" a state statute enacted under the other equal constitutional provision, namely, the



Twenty-first Amendment. Indeed, as Justice Frankfurter said in his concurring opinion in *U.S. v. Frankfort Distilleries,* supra:

> ". . . before a federal law may preempt state legislation, the federal statute must be free from constitutional infirmity. Constitutional amendments limit the power of Congress as well as that of the states when so considered . . ."

As Justice Frankfurter also pointed out, in that same concurring opinion in the *Frankfort Distilleries* case:

> ". . . Since the Commerce Clause is subordinate to the exercise of State power under the Twenty-first Amendment, the Sherman law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to State power drawn from the Twenty-first Amendment. And so, the validity of a charge under the Sherman law relating to intoxicating liquors depends upon the utilization by a State of its constitutional power under the Twenty-first Amendment . . ."

On the question of congressional intent, it appears that rather than restrict the states' powers to regulate liquor within their borders and indeed even liquor in interstate commerce, Congress has not attempted to restrict the power, but rather has expanded it. When the Supreme Court, prior to the adoption of the Wilson Act, held that the Commerce Clause gave Congress broader powers than had been recognized in *The License Cases,* Congress attempted to restore that power to the states. Later, when the power of the states was again deemed to have been threatened by decisions of this Court interpreting the Wil-

son Act, Congress again restricted its own powers under the Commerce Clause by enacting the Webb-Kenyon Act, an Act which has been held to have taken intoxicating liquor "out of interstate commerce." Again, in adopting the resolution which became the Twenty-first Amendment, Congress was a party to "constitutionalizing" the restriction on its power under the Commerce Clause to enact legislation affecting liquor where the state acted pursuant to the Twenty-first Amendment.

The most recent and clear statement of legislative intent involving the question before this Court, and one which would seem to be entitled to more weight than speeches by Senators debating a Senate resolution, is the Report of the Senate Judiciary Committee at the time the Miller-Tydings and McGuire Acts were repealed by Congress in 1975:

> ". . . Thus, while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do so in States which pass price fixing statutes pursuant to the Twenty-first Amendment."

In addition to the lack of congressional intent to preempt state regulatory provisions controlling liquor within a state's borders, the *National Railroad Passenger Corp.* case, (358 F.Supp. 1321, aff'd 414 U.S. 948), and the *Castlewood* case, (596 F.2d 638, 5th Cir.), are examples of where the court avoided a conflict between federal and state law, as in the *National Railroad Passenger Corp.* case, (holding that if the Railroad Passenger Act allowed the service of alcoholic beverages by the drink in Kansas that it would be an unconstitutional statute since it conflicted with the



prohibition enacted by the state of Kansas to serving alcohol by the drink under the Twenty-first Amendment) and in *Castlewood Corp.,* where a regulation of the Bureau of Alcohol, Tobacco & Firearms, the federal agency created by the federal Alcohol Administration Act, relating to the amount of discount to be allowed on beer (i.e., a price regulation) conflicted with a state regulatory provision relating to discounts, was therefore held to be invalid since the state regulatory provision was based upon the Twenty-first Amendment.

It is argued by Midcal and the United States that the "state action" exemption is not applicable in this case because the conduct is "privately initiated". The conduct, that is, the setting of the prices of its own brand by the wine producer at wholesale and retail, is not "initiated" by the wine producer, rather, it is required by the state statutes involved. It is further argued that the setting of the prices is not "supervised" by the state, and therefore the statutes do not qualify for the "state action" exemption. Petitioner would submit that the method by which a state seeks to promote the objectives of the regulatory provisions, whether by allowing the brand owners or producers to set the prices for their products, whether the Legislature enacts minimum markup statutes, whether minimum markup regulations are adopted by the administrative agency charged with enforcing the regulatory provisions, or whether an administrative agency itself, after hearings, sets the prices, is a matter that is best left up to the states. Petitioner would contend that so long as the conduct is required, that it is part of a comprehensive regulatory scheme

for achieving legitimate state purposes, the "state action" exemption should apply.

The California regulatory provisions involved are valid statutes enacted pursuant to the Twenty-first Amendment for achieving a valid state purpose of regulating liquor within the borders of California, and thus should be upheld by this Court, with or without considering the effects of the "state action" exemption.

## II

## NO OTHER CALIFORNIA COURT HAS RULED ON THE FACTUAL ISSUES OR THE WHOLESALE TO RETAIL PROVISIONS OF THE REGULATORY PROVISIONS INVOLVED IN THE ACCUSATION AGAINST MIDCAL IN THIS CASE; THE DECISION OF THIS COURT WILL HAVE AN IMMEDIATE AND DIRECT IMPACT ON ALL THE PARTIES AND THE CASE IS IN NO WAY MOOT AS CONTENDED BY MIDCAL

As stated by Midcal[1] it filed a "mandamus petition [in the California Court of Appeal] . . . seeking a determination of the invalidity of wholesale and retail RPM."[2] Petitioner sought leave to intervene in the State Court of

[1]Midcal Brief, p. 17.

[2]The term "RPM" is more misleading than helpful in discussing this case. It can mean either resale price maintenance or retail price maintenance. *Resale* price maintenance can refer to either wholesale or retail prices; *retail* price maintenance refers only to retail prices. *Rice* involved only *retail* price maintenance yet both terms were used to describe that level of trade. (See Pet. for Cert., Appendix, pp. C-36, C-37.) The case before this Court factually involves violations of the wine price posting requirements at *wholesale* which have not been ruled upon by any California Appellate Court as contrasted to the *Capiscean* case which only involved price maintenance at *retail* and which did declare "retail price maintenance" for wine to be invalid. (See Pet. for Cert. Appendix D-4.) In view of the interpretation now being suggested by Midcal of the holding of the *Capiscean* case, i.e., that it applies to wholesale as well as retail, seemingly to support a meritless collateral estoppel argument, the use of the term RPM in the Midcal brief is particularly inappropriate.



Appeal which was granted by that court and Petitioner thus became a *party* to the proceeding in the court below.[3]

The Court of Appeal followed the California Supreme Court's decision in *Rice* (*Corsetti*)[4] and declared the state regulatory provisions invalid on solely federal grounds, i.e., that they constituted "price-fixing" in violation of the Sherman Act and pointed out that *Rice* (*Corsetti*) held that neither the Twenty-first Amendment nor the "state action" exemption "provide a basis for upholding" them. (Appendix A-4 and A-9, Pet. for Cert.)

Midcal, in seeking a reversal of this Court's order of November 26, 1979 granting "the motion of State of California for divided argument" allowing the California Attorney General to present ten minutes of oral argument on behalf of the State of California raised a "suggestion of mootness" and "collateral estoppel."[5] In the order of De-

[3]California Code of Civ. Proc. § 387 provides, in part, that ". . . any person, who has an interest in the matter in litigation . . . may intervene. . . ." It further provides that ". . . intervention takes place when a third person is permitted to become a party to an action. . . ."

[4]There is only one California Supreme Court case directly related to this review. The Court of Appeal below referred to it as "*Rice*", the *Capiscean* court referred to it as "*Rice*"; Midcal referred to it as "*Rice*" in its "Opposition to Petition for Writ of Certiorari" herein; Petitioner has consistently referred to it as "*Rice*"; Midcal, in its brief before this Court, now refers to this same case as "*Corsetti*". In order to prevent further possible confusion, Petitioner will henceforth refer to that case as "*Rice (Corsetti)*."

[5]Midcal's "Memorandum in Response to Motion of State Attorney General to Present Oral Argument in Support of Petitioner and Suggestion of Mootness." At pages 2 and 3 of that Memorandum Midcal states: "The memorandum further raises a suggestion of mootness, because of a previous decision by a state appellate court against the ABC on wine price maintenance statutes—a decision that was not appealed and thus became final and binding on the ABC. Because of the collateral estoppel consequences of that state

cember 10, 1979 in which Midcal's "motion for reconsideration of the order of November 26, 1979 granting divided argument" was denied, this Court also ordered that "Further consideration of Respondent's suggestion of mootness is deferred to the hearing of the case on the merits." Petitioner will now address that matter.

After petitioning for a ruling from the lower court on the solely federal questions, Midcal now, for the first time before this Court[6] seeks to avoid a decision reversing the lower court's decision and clarifying the uncertainty that exists in the law because of the California Supreme Court's decision in *Rice* (*Corsetti*) and the lower court's ruling that it was "bound by that decision." (See Pet's. Opening Brief, p. 10.)

More specifically, Midcal seeks to avoid a final "judicial determination" in this case from the only Court that has jurisdiction to render a meaningful and binding decision on the precise federal questions on which Midcal originally sought to have a "judicial determination" by the court below.

---

appellate court final judgment for the ABC, the real party in interest on the issues presented, any ruling by this Court on the merits could constitute nothing more than an advisory opinion on a moot controversy." This statement by Midcal is not correct either factually or as a matter of law as will appear in Petitioner's discussion of these contentions.

[6]No questions of "mootness", failure to enforce, "collateral estoppel", standing of the parties or any of the other vaguely alluded to alleged procedural deficiencies were raised in the courts below by Midcal. Nor did Midcal raise any of these alleged grounds for avoiding a decision by this Court in its "Brief in Opposition to Petition for Writ of Certiorari." Failing to raise these alleged issues earlier in this proceeding is understandable—there is no basis for the contentions.



Midcal now argues that the *Capiscean* court ruled that wine wholesale price posting was invalid;[7] that the decision "became final"[8] and therefore the present review presents a "belated collateral attack" on the earlier court decisions.[9]

Midcal's brief also would appear to have the tendency to create an impression that the *wholesale* to retail price posting provisions for wine involved specifically in this case are not being enforced in California.[10] Although the particular relevance of such a circumstance, even if it existed, is not apparent, the reverse is in fact true. To demonstrate the inaccuracy of any such impression, attached as Exhibits "A", "B", and "C" to this brief, are

---

[7]Midcal states at page 17 of its brief:

"However, the court's opinion [*Capiscean*] declares that wine RPM in California is invalid *at both the wholesale and retail levels* and the court's ruling has been so interpreted." (Emphasis added.) (Citing a recent law review comment.)

The statement is in error as Midcal itself recognizes:

"Technically speaking, the judgment in *Capiscean* may reach only wine RPM at the retail (consumer) level; the accused in the case was a retailer prosecuted only for selling below fixed minimum retail prices . . ." (Midcal Brief, p. 17.)

[8]Midcal Brief, pp. 16 and 17:

"The ABC did not seek review of the *Capiscean* ruling. Nor did the AG or anyone else. The ruling and judgment of the court became final. . . ."

[9]Midcal Brief, p. 19:

"Viewed realistically, the arguments raised in support of reversal in this case represent a belated collateral attack on state court decisions."

[10]Midcal Brief, p. 19:

"Moreover, the state officers with administrative authority over the statutes at issue do not seek reversal and do not endorse alcoholic beverage RPM. . . ."

". . . the state has largely adapted to the competitive principles of the Sherman Act . . ."

". . . It would be disruptive, if not impractical, to attempt to reverse that course at this late date and *to reimpose RPM on state officers* who do not want it . . ." (Emphasis added.)

three accusations filed against California wholesale licensees for violating the same wine wholesale to retail provisions of the Act as those which Midcal admits violating.[11] The fact that the lower California court stayed the effectiveness of its decision declaring the provisions invalid "until further order of the court" is also significant in that regard. (See Jt. Appen., p. 54.)

California law on the question of collateral estoppel, since it is not even factually involved, as discussed later, is irrelevant. (Since Midcal contends for a *legal* interpretation of collateral estoppel that is not supported by California law Petitioner will also discuss collateral estoppel later in this section.) However, there could be no collateral estoppel in this case in any event since the question of the validity of the regulatory provisions requiring the posting of the price of wine from wholesale to retail have not been challenged or decided by any California case except the instant one now before this Court. A brief discussion of the facts of this case eliminates any confusion about the *wholesale* price posting basis of the instant case.

The facts of this case are simple. The Department filed an accusation against the southern California Gallo Wine affiliate, Midcal Aluminum, Inc., (dba Gallo Wine Company—see Exhibit C, Jt. Appen.) which occupies a dominant position in the southern California wine market. (See declaration of Mandella, Jt. Appen. 39.) The accusation charged a violation of the wholesale to retail provisions of §§ 24862 and 24866 of the Act and of Rule 101 of Title 4 of the California Administrative Code. No charge was

[11]Indeed, two of the accusations are virtually current having been filed with the Department on December 5, 1979.



made in this accusation that the Gallo distributor had in any way violated the retail to consumer provisions of §§ 24862 and 24866 or Rule 101. The specific charges were that Midcal had sold wine at wholesale to a retailer for which no wholesale to retail price had been posted with the Department and additionally that it had sold wine at wholesale to retail at prices below those posted with the Department. In both instances, the charges involved sales by this *wholesale* distributor to retailers. In no way were sales at the retail to consumer level involved in the instant case now before this Court. (See Exhibit C, Jt. Appen., pages 16-18.)

In admitting the charges in a stipulation with the Department, Midcal agreed to accept a penalty of either a "monetary fine or a suspension of its license" if the provisions were declared valid after a "judicial determination." (See Exhibit D, Jt. Appen., pages 19-20.)

The final disposition of this accusation against Midcal by the Department is pending and awaits the outcome of the review by this Court. In view of the factual basis of the accusation against Midcal, the stay order issued by the lower court, the continued enforcement by the Department of the sections involved, and the pendency of this accusation against Midcal, questions of "mootness" or "collateral estoppel" are not present in this case.

When a case before this Court involves questions that affect the rights of litigants in the case before the Court it is not "moot." (*Preiser v. Newkirk* (1975) 422 U.S. 395, 401; *North Carolina v. Rice* (1971) 404 U.S. 244, 246.

> ". . . basically, 'the question in each case is whether the facts alleged, under all the circumstances, show

there is a substantial controversy, between parties having adverse legal interests. . . .' "
(*Preiser v. Newkirk,* supra, at 402.)

No California court had ruled on the validity of the wholesale to retail wine price posting provisions of §§ 24862 and 24866 prior to the decision of the Court of Appeal in this case. Neither has any California Court of Appeal nor the California Supreme Court ruled on the validity of the wholesale to retail wine price posting provisions since the instant case was decided by the California Court of Appeal.[12] To reiterate, the question as to the validity of the wholesale to retail provisions of the California wine statutes and the rule involved in this action have not been ruled upon by any California Appellate Court. However, this is not to say that the holding of the *Capiscean* case, relied upon by Midcal in its contention that the wholesale to retail wine price posting provisions have been ruled upon by California courts, has not been discussed, as indicated below:

[12]The California Act likewise requires the posting of the wholesale to retail prices for distilled spirits (§ 24756 of the Act) and beer (§ 25000 of the Act) and the adherence to those prices by the selling wholesaler. In a petition for writ of mandate in the case of *Farmers Markets, Inc. v. Baxter Rice,* 3 Civil 18743 (see reference in Pet. for Cert., p. 8, fn. 3) these provisions were alleged to be invalid under the Sherman Antitrust Act. The *Midcal* Court of Appeal denied the requested writ "out of hand" and the California Supreme Court denied a petition for hearing on November 15, 1979. A writ was likewise sought in the case of *Ferrigno v. Alcoholic Beverage Appeals Board,* 1 Civil 47118 (see fn. 2, p. 7, Pet. for Cert., and Appendix E, Pet. for Cert.) from another California Court of Appeal. The *Ferrigno* case involved, among other factors, the wholesale to retail price posting provisions for beer. The Court of Appeal denied the request for an alternative writ and the California Supreme Court, on December 27, 1979, denied a petition for hearing. Thus, there has been no declaration of invalidity of the price posting provisions at wholesale for either distilled spirits or beer.



(1) The Court of Appeal in this case interpreted *Capiscean* as only applying to price maintenance provisions as they applied to retail sales. The Court of Appeal, in discussing the effect of the *Capiscean* case stated "See also, *Capiscean Corp. v. Alcoholic Bev. etc. Appeals Bd.* (1979) 87 Cal.App.3d 996 [151 Cal.Rptr. 492], holding the price maintenance provisions relating to the *retail* price of wine to be invalid under *Rice.*" (Emphasis added.) This is a ruling by a state court on the scope of a state court opinion. Midcal cannot now challenge this holding in this Court since, it is generally held, that such an interpretation by a state appellate court is binding on the federal courts. (See e.g., *Six Companies v. Highway District* (1940) 311 U.S. 180, 188.)

(2) In the brief "For the United States as Amicus Curiae" filed recently in this case by the Solicitor General in a footnote on page 7 of its uncorrected typescript, the following conclusion is drawn as to the holding of the *Capiscean* case:

> "*Corsetti* had previously been applied to the wine statute with respect to *retail sales to consumers* in *Capiscean Corp. v. Alcoholic Beverage Control Appeals Board* . . ." (Citation omitted.) (Emphasis added.)

(3) Significantly, before this Court granted certiorari in this case and therefore determined to review the federal issues, Midcal itself in its "Brief in Opposition to Petition for Writ of Certiorari" observed, at page 5:

> "Subsequently, the matter was appealed to the California Court of Appeal, First Appellate District, where § 24862 was declared invalid as it pertains to

minimum *consumer resale prices.* (*Capiscean Corp v. Alcoholic Beverage Control Appeals Board,* 87 Cal. App.3d 996, 151 Cal.Rptr. 492 (1979).)" (Emphasis added.)

There is no question that this case is properly before this Court; that this Court can review the merits of this case, and, if it determines, as Petitioner urges it should, that the court below erred in application of the federal law to the California regulatory provisions involved, it can then reverse this decision, and send it back to the California Court of Appeal which will then follow the decision by this Court. It is likewise clear that the Department will "comply fully" with such a decision and impose the penalty on Midcal for its violation of the valid California regulatory provisions involved.[13]

A discussion of collateral estoppel is prompted only by Midcal's recent assertion of its applicability here. As demonstrated in the discussion of the factual basis of this case above, and in the discussion of the California law on collateral estoppel which follows, the doctrine is simply not involved in this case before this Court.

At pages 16 and 17 of Midcal's "Memorandum in Response to Motion of State Attorney General to Present Oral Argument in Support of Petitioner and Suggestion of Mootness", Midcal claims that the Department is col-

[13]See two page "Statement of Department . . ." to this Court dated November 29, 1979, wherein the Department stated that it felt that "as a constitutional agency of the State of California it is bound by the holdings of the highest court of this State [referring to *Rice* (*Corsetti*)] . . .". The Department added, however, ". . . To be sure, should this Court overrule the holding of the California courts this Department would comply fully with such decision . . ."



laterally estopped by the decision of the California Court of Appeal in *Capiscean.* As authority for this proposition, it cites *Bernhard v. Bank of America,* 19 Cal.2d 807, *City of Los Angeles v. City of San Fernando,* 14 Cal.3d 199, *Hollywood Circle, Inc. v. Department of ABC,* 55 Cal.2d 728 and *Chern v. Bank of America,* 15 Cal.3d 866. Even a cursory reading of these cases demonstrates the non-application of the doctrine to this case.

Initially, it should be pointed out that under California law collateral estoppel does not apply to an issue of law when it is being asserted to prevent enforcement of a state statute by a state agency such as the Department. As a result, collateral estoppel, even if the doctrine were otherwise relevant here, would not apply for that reason alone.

> "The rule of collateral estoppel is a manifestation of the principle of res judicata. [cite] The courts will not apply that principle to foreclose the relitigation of an issue of law covering a public agency's ongoing obligation to administer a statute enacted for the public benefit and affecting members of the public not before the court. (*Chern v. Bank of America* (1976) 15 Cal.3d 866, 872 [127 Cal.Rptr. 110, 544 P2d 1310]; *Louis Stores, Inc. v. Department of Alcoholic Beverage Control,* 57 Cal.2d 749, 758 [22 Cal.Rptr. 14, 371 P2d 758] . . .)" (*California Optometric Assn. v. Lackner,* 60 Cal.App.3d 500, 505, 131 Cal.Rptr. 744 (1976).)

The cases cited by Midcal generally hold that once parties litigate a matter, they are estopped from relitigating questions of fact or law which were necessarily decided in the former action *and* which arise from the same transaction or where the subject matter of the action is the same property.

In *Bernhard v. Bank of America, supra,* cited by Midcal, a probate court held that money in the defendant's account was a gift from a decedent and that plaintiff had no claim to it. The plaintiff later brought another action in the superior court to recover the money in defendant's account. The California Supreme Court held that res judicata applied and that the plaintiff was barred from relitigating the same claim, arising from the same transaction and involving the same money.

The present case does not arise from the same transaction or set of circumstances as the *Capiscean* case. The *Capiscean* case involved similar questions of law but did not arise from the same transaction as this case. These were two separate actions against two different violators. Persons subsequently accused of law violations are not barred from raising a legal defense just because it was raised in the past.

The *Hollywood Circle* case, supra, was also a case where the plaintiff attempted to relitigate the exact same claim. Its liquor license was revoked by the Department and it appealed to the Alcoholic Beverage Control Appeals Board. The Appeals Board dismissed the appeal as not timely filed based on an erroneous interpretation of a statute. Plaintiff sought a writ of mandate in the superior court which was denied. It appealed but the Court of Appeal affirmed the superior court. The California Supreme Court denied its petition for hearing. Later, in another case not involving Plaintiff, the California Supreme Court disapproved the earlier Court of Appeal decision. Plaintiff thereupon attempted to relitigate his earlier case by



again seeking the issuance of a writ of mandate based on the California Supreme Court's decision. The California Supreme Court held that the plaintiff was barred by the doctrine of res judicata even though the prior decision was erroneous since he had fully litigated the issue before. This case does not apply to *Midcal* because the *Midcal* case did not arise from the same transaction as the *Capiscean* case.

Another case that Midcal cites for its proposition is *City of Los Angeles v. City of San Fernando,* supra. The Supreme Court in that case held that there was no res judicata or collateral estoppel effect between the same parties if the second action was a different cause of action. The Court stated, at page 230:

> " . . . This court observed in *Louis Stores, Inc. v. Department of Alcoholic Beverage Control* (1962) 57 Cal.2d 749, 757, as follows: 'An important qualification of the doctrine of collateral estoppel is set forth in section 70 of the Restatement of Judgments, which reads as follows: "Where a question of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is *not* conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arise out of the same subject matter of transaction; and in any event it is not conclusive if injustice would result." ' " (Emphasis added.)

Midcal also cites *Chern v. Bank of America,* supra. In this case, the California Supreme Court distinguished the *Bernhard* line of cases.

"As will appear, a principal issue in the instant case is essentially a legal one, namely, whether defendant's alleged practice constitutes false or misleading advertising under California law. . . . in contrast, the estoppel cases relied on by defendant, including *Bernhard,* involved attempts to relitigate factual issues arising out of the same subject matter or transaction as the prior suit. The difference is significant.

"We acknowledge, further, a sound judicial policy against applying collateral estoppel in cases which concern matters of important public interest. In *Louis Stores, Inc. v. Department of Alcoholic Beverage Control* (1962) 57 Cal.2d 749, for example, we declined to give estoppel effect to bar an administrative agency from relitigating the issue of whether a certain practice by a defendant constituted sufficient cause to revoke a liquor license, noting that the statute authorizing the revocation of licenses 'concerns the public interest in an industry requiring close supervision.' . . . Given the quality and intensity of the public interest involved, a reexamination of the legal significance of recurring factual events in which the same plaintiff is involved should not be foreclosed under collateral estoppel principles. For this reason and the other reasons hereinabove discussed, we decide the legal issues raised by plaintiff in the present suit." (*Chern v. Bank of America,* 15 Cal.3d 866, 872-873).

In the *Louis Stores, Inc. v. Department of Alcoholic Beverage Control* case cited above, the California Supreme Court adopted § 70 of the Restatement quoted above. The Court also adopted the reasoning of comment "f" to that section:

> "The determination of a question of law by a judgment in an action is not conclusive between the parties in a subsequent action on a different cause of action, even though both causes of action arose out of the same subject matter or transaction, if it would be unjust to one of the parties or to third persons to apply one rule of law in subsequent actions between the same parties and to apply a different rule of law between other parties." (57 Cal.2d 749, 757.)



This reasoning was followed in several other California cases. In *Cochran v. Union Lumber Co.* (1972) 26 Cal.App. 3d 427, the court refused to apply collateral estoppel. An earlier case brought by another plaintiff had litigated the meaning of a clause in a contract with Union Lumber Company who was the defendant in that action. That court interpreted the clause against Union Lumber. In the later action brought by Cochran against Union Lumber, Cochran sought an interpretation of an identical clause in his contract with Union Lumber. The Court of Appeal cited *United States v. Stone & Downer Co.,* 274 U.S. 225, 235-237 and *Louis Stores v. Department of Alcoholic Beverage Control,* supra, and held that the trial court was not estopped from deciding the identical legal issue involved in the earlier case. *Louis Stores* was also followed in *Bleeck v. State Board of Optometry* (1971) 18 Cal.App.3d 415, 430. The *Bernhard* line of cases cited by Midcal states that the collateral estoppel effect does not apply if important public issues are at stake. As stated in the *Louis Stores* case, the State has an important interest in regulating alcoholic beverages. The California Legislature specifically declared in § 23001 of the Act:

> "The subject matter of this division [entire Act] involves in the highest degree the economic, social, and

moral well-being and the safety of the state and all of its people."

Further, the *Bernhard* line of cases require mutuality. A party cannot assert collateral estoppel against the other party unless that other party could have asserted estoppel had the earlier decision gone the other way. In this case, for example, under California law, the Department could not have asserted estoppel against Midcal in its challenge of the statute if the *Capiscean* licensee had lost.

In light of the foregoing authorities, there can be no question that the doctrine does not apply in this case. Midcal bases its mootness argument on the effect of collateral estoppel, the mootness argument is without merit.

Turning now to the *consumer* price maintenance provisions of the wine regulatory provisions involved, and to the *Rice* (*Corsetti*) case which involved *retail* to consumer price maintenance provisions for distilled spirits, it would appear that a short analysis of that situation is in order. First of all, Petitioner is aware of no law or judicial precedent which in any way would prevent or forbid this Court from *overruling,* as opposed to *reversing,* the decision of the California Supreme Court in the *Rice* (*Corsetti*) case. The same would hold true of the *Capiscean* case. Midcal seemingly is contending it is somehow "too late" for this Court to overrule the *Rice* (*Corsetti*) case and clear up the state- and nation-wide confusion and uncertainty engendered by that decision by California's highest state court contrary to the well-established federal law involved.



Surely this Court is not without power to eliminate the effect of the *Rice* (*Corsetti*) case first in connection with ruling on the instant case since the court below based its decision on the "rationale" of the *Rice* (*Corsetti*) case, and deemed itself "controlled by the reasoning of the Supreme Court in *Rice.*" (Pet. for Cert., A-5.) Although Petitioner does not concede that the rationale of the *Rice* (*Corsetti*) case necessarily compels a declaration of invalidity of the wine wholesale to retail price posting provisions involved, there are certain similar features of these provisions and the price maintenance provisions involved in *Rice* (*Corsetti*) that are significant in that regard. We refer specifically to the fact that generally it is a domestic wine producer or an in-state agent of an out-of-state wine producer who sets and posts the wholesale to retail and retail to consumer prices for its own branded wine rather than the seller, a requirement found objectionable by the *Rice* (*Corsetti*) case.[14] This feature distinguishes the wine price posting provisions at wholesale from those involving distilled spirits and beer (§§ 24756 and 25000). In any event, the *Rice* (*Corsetti*) case is incorrectly decided, and so long as it remains "on the books" without being specifically

---

[14]There are exceptions to this general statutory requirement that the wine producer or authorized agent set the wholesale and retail selling price of wine. For example, in the case of imported wine § 24867 provides, in part:

> ". . . Provided, however, that when two or more persons without the state sell the same brand of wine to importers in this state, each such *importer* may file *his own selling prices to retailers* for the brand." (Emphasis added.)

Or where the wholesaler himself owns the brand. See subsection (b) of § 24866.

"overruled" by this Court, it will continue to create uncertainty, confusion and havoc in California[15] as well as nationally.[16]

The Midcal brief also tends to create an impression that the California Legislature has abandoned any statutory provisions that have an "anti-competitive" effect in liquor regulation and particularly those relating to price.

Section 24755, declared invalid by the California Supreme Court in 1978, has not been repealed by the California Legislature. Sections 24862 and 24866, declared invalid in this case, have not been repealed by the California Legislature. The price posting provisions at wholesale for distilled spirits and beer have not been repealed by the

[15]On December 31, 1979, the *Midcal* Court of Appeal issued an alternative writ in the case of *Norman Williams Company, etc. et al. v. Baxter Rice,* 3 Civil 19089. Petitioner in that matter challenges the validity of the provision in the California Act that requires the distillers to designate its importers in California and prohibits importation by an importer unless so designated. One of the grounds urged by petitioner is that the section is invalid under the rationale of the *Rice (Corsetti)* case. There are 17 other states having similar "designation" or "primary source" statutes in their law relating to alcoholic beverages. Kansas, in 1979, adopted, for the first time, such a provision. (See Chapter 153 of the 1979 Session Laws of Kansas, House Bill 2020.) On November 14, 1979, the Kansas Supreme Court upheld the validity of that provision and others, including "minimum mark-up" provisions for the retail sale of alcoholic liquor to replace the earlier system whereby the *state* established the minimum prices. At the time of filing this brief the Kansas Supreme Court had not yet "supplemented" its decision by a "formal opinion." The decision of the Kansas Supreme Court is included in the Appendix to this brief as Exhibit "D".

[16]See *Castlewood Intern. Corp. v. Simon,* Pet's. Opening Brief, p. 13, 41 and 42; *In the Matter of William J. Mezzetti Associates, Inc. v. State Liquor Authority,* Pet. for Cert. pp. 34, 35 where the New York retail fair trade provisions for wine are being questioned and where the *Rice (Corsetti)* case has been cited—but not followed by the Appellate Division.



California Legislature and as noted have withstood challenge similar to that in the instant case.

When California repealed its general fair trade statute in 1975 (1975 Cal. Stats., Ch. 402) it left the various sections of the Act relating to price regulation for liquor intact.

Although, again, Petitioner submits that the matter is not relevant to any issues involved in this review, a brief discussion of Midcal's reference to Assembly Bill 935 at page 14 of its brief seems in order. Midcal states:

> "The Legislature also rejected AB 935, an attempt, opposed by the ABC, to revive fair trade in the form of a minimum price markup for distilled spirits at the retail level. . . ."

A fair reading of that comment would seem to indicate that there had been an unfavorable vote by the California Legislature on AB 935. That is simply not true. Included in the appendix as Exhibit "E" to this brief, is the first page of the transcript of the hearing of Monday, November 20, 1978, before the California Senate Committee on Governmental Organization, this being the same hearing to which the letter of December 4, 1978, from Chairman Dills to Senator Mills included as Exhibit "C" in Midcal's "Memorandum in Response to Motion of State Attorney General . . . etc." refers.

The most significant paragraph from that page is as follows:

> "AB 935, the Alcoholic Beverage Unfair Practices Act, was heard and *approved* by this committee on August

7, 1978. At a later date, the measure was rereferred to this committee by the Senate Finance Committee for an interim study." (Emphasis added.)

At the time the hearing was conducted, the Midcal case was filed and pending and would determine the validity of the *Rice* (*Corsetti*) case, and § 24755, (retail price maintenance for distilled spirits) if this Court would undertake to review it. As pointed out, § 24755 had not been repealed. The California Legislature has not determined what action to ultimately take on retail price maintenance, if any. The point is that whatever decision is made on what form of price maintenance to have at the retail level, if any, is a matter for the Legislature and not for the courts and the reference to legislative action, or inaction, in that regard, is irrelevant.

Midcal refers to the Governor of California in its brief and in its memorandum seeking to prevent the Attorney General from representing the State of California. The references are apparently based on a theory that the record herein, even if it were deemed to include newspaper articles, transcripts of testimony in hearings not related to the issues in this case, or other matters that are generally thought not to be included in a record on appeal, somehow supports a two-fold proposition:

(1) That the Governor, and not the Attorney General, represents the State of California in liquor litigation and therefore the Attorney General is without authority to appear on behalf of the State of California in this case. (For response to the contention that the Attorney General lacks authority see Petitioner's Memorandum in Response



to Respondent Midcal Aluminum's Opposition to the California Attorney General Dividing Oral Argument With Petitioner," dated November 28, 1979, consisting of four pages), and;

(2) Somewhere in the record there is some indication or proof as to the Governor's "desires", "wishes" or position on the matter of the enforcement of California regulatory provisions relating to liquor.

Questions concerning the Governor's position or the Attorney General's authority are totally irrelevant to any issues in this case. Furthermore, as to the Governor's position as to enforcing California liquor laws there is nothing in any of the material submitted to this Court in the record below, or otherwise, that supports any conclusion as to that irrelevant matter. Additionally, Article XX, Section 22 of the California Constitution and the Act itself places responsibility for administering and enforcing the Act, "in accordance with laws enacted by the Legislature," in the Department. The Director is the head of the Department—not the Governor. The Director's position, taken as Director, and the position he has represented to this Court is that he "is bound by the holdings of the highest court of this State." He further represents to this Court that "should this Court overrule the holding of the California courts this Department would fully comply with such decision." (Statement of Department of Alcoholic Beverage Control of November 29, 1979, directed to this Court.)

Consequently, if Midcal is contending that the Governor or indeed the Department will not abide by a decision of this Court reversing the instant case and overturning the

*Rice (Corsetti)* case, such a contention finds no support in either the record or the vast amount of material submitted in this case that is outside of the record from the court below.

Petitioner regrets that any issues have been raised in this matter before this Court other than the basic question of the extent and scope of the state's power to enact regulatory measures relating to alcoholic beverages under the Twenty-first Amendment. It is Petitioner's urgent hope that the Court's attention has not been diverted from the only issue in the case, and that is, the validity of the California regulatory provisions involved.

## III

## CONTRARY TO MIDCAL'S CONTENTIONS PETITIONER RAISED THE EFFECT OF THE WEBB-KENYON ACT BELOW AND BEFORE THIS COURT IN ITS PETITION FOR WRIT OF CERTIORARI AND IT IS REASONABLY AND NECESSARILY INCLUDED IN THE QUESTIONS PRESENTED TO THIS COURT

Although Midcal argues that the legislative history of the Webb-Kenyon Act and perhaps even the Webb-Kenyon Act itself supports its position that the states' power to regulate liquor (without restriction by the Commerce Clause) is limited to regulatory provisions that either prohibit or restrict "importation" based upon its own interpretation of the language of § 2 of the Twenty-first Amendment, it nevertheless argues to this Court that the Webb-Kenyon Act is not properly before this Court because of an alleged defect in presenting that matter to the court below and of a failure by Petitioner to include it in



the "Questions Presented" in its Petition for Writ of Certiorari.[17] Petitioner did in fact argue the matter before the Court of Appeal as indicated by the statement from its points and authorities filed in that court.[18]

In its Petition for Writ of Certiorari to this Court, Petitioner alludes to or discusses the Webb-Kenyon Act on three different pages.[19]

Further, it would appear without question that the legislative history of the Acts that predated the Twenty-first Amendment, including both the Wilson Act and the Webb-Kenyon Act, is helpful both in an understanding of the background of the Twenty-first Amendment, and also because of the direct impact by the Webb-Kenyon Act on the interstate nature of liquor, having removed it from interstate commerce.

The federal statute, Webb-Kenyon, that was "constitutionalized" by the Twenty-first Amendment would seem a particularly appropriate statute to consider in this review. (See *Craig v. Boren,* 429 U.S. 190 at page 206.)

Additionally, there would appear to be no serious question that the Wilson Act and the Webb-Kenyon Act are properly included within the questions to be considered by this Court, as indeed this Court itself in the case of *Craig v. Boren,* supra, chose to discuss the history of liquor regulation by the states, including the Webb-Kenyon Act. (*Craig v. Boren,* supra, pp. 205-206.) (See also, *Blonder-*

---

[17]Midcal Brief, p. 33.

[18]Page 3, Points and Authorities in Support of Intervenor's Opposition to Petition for Writ of Mandate, p. 232 of Certified Record.

[19]Pet. for Cert., pages 11, 20 and 21.

*Tongue Lab., Inc. v. University of Illinois Found.* (1971) 402 U.S. 319, 320—Court may consider questions even if not raised by the parties.)

The basic issue in this case is whether or not the regulatory provisions involved are a proper exercise of the states' power to regulate liquor under the Twenty-first Amendment in view of the Commerce Clause and the Sherman Act. Certainly a federal statute that removes liquor from interstate commerce is a significant part of that issue. Consequently, the Webb-Kenyon Act is an issue that is "fairly comprised" within the "Questions Presented" in the Petition for Certiorari. (Supreme Court Rule 23.1(c).) Midcal's objection has no merit.

## IV

## THIS COURT SHOULD NOT NOW LIMIT A STATE'S LEGISLATIVE POWER BUT SHOULD REAFFIRM THE DOCTRINE THAT HAS BEEN APPLIED CONTINUOUSLY SINCE THE RATIFICATION OF THE TWENTY-FIRST AMENDMENT THAT WHEN A STATE ACTS TO REGULATE LIQUOR, WITHIN ITS BORDERS, IT IS "UNFETTERED BY THE COMMERCE CLAUSE" AND THAT THE TWENTY-FIRST AMENDMENT REVERSES THE NORMAL FEDERAL-STATE ROLES UNDER THE COMMERCE CLAUSE

### A. The Contention, Presently Being Made by Midcal, that the Twenty-first Amendment Simply Grants Power to a State to Prohibit or Restrict the Importation of Liquor Into the State is Contrary to the Rulings of this Court and is Patently and Historically Without Merit

In its earlier "Brief in Opposition to Petition for Certiorari" herein, Midcal supported the position of the California Supreme Court in *Rice* (*Corsetti*) that the court should apply a "balancing of the interests" test to determine the validity of a state legislative program regulating



liquor within its borders. In its present brief before this Court and for the first time in this litigation, Midcal now virtually abandons that support and argues for an interpretation of the Twenty-first Amendment that would restrict a state's power under the Twenty-first Amendment to either prohibiting the importation of liquor or restricting its importation.

Midcal is now contending that the two phrases in § 2 of the Twenty-first Amendment, namely, "transportation or importation" of liquor "into any State . . ." constitutes the "key concept that governs every other word in the Section." (Midcal's Brief, p. 41.)

> Midcal continues in this vein at that same page: ". . . It requires a tortured reading indeed to convert the language of § 2 into an across-the-board repeal of the federal antitrust laws or into a plenary grant of authority to the states over all aspects of the alcoholic beverage business, *whether or not related to unwanted importation*. . . ."

Further proof that Midcal's entire argument in this regard is based upon what it apparently considers to be the literal language of § 2 is also found on page 41, where in attempting to refute Petitioner's position in this case on the meaning of the Twenty-first Amendment it states that ". . . the text of the provision will not support it. . . ."

Midcal further takes the position that the legislative history of § 2 of the Sherman Act justifies its interpretation that it was intended only to permit "dry" states to remain "dry." Midcal argues that "In sum, the legislative history of § 2, the provision relied on by Petitioner, illustrates a

purpose *simply to allow prohibition to those states that really wanted it.* It does not indicate that the Amendment was designed to do more than that." (Emphasis added.) (Page 47, Midcal Brief.)

Midcal's new position is not supported by the long line of judicial precedent by this Court beginning with *State Board v. Young's Market Co.,* 299 U.S. 59, the first case decided by this Court in 1936 after the Amendment was ratified by the states in 1933, nor is it supported by the legislative history of either the Twenty-first Amendment or the Webb-Kenyon Act, and it is not supported by, either reason or logic, all as discussed hereinafter by Petitioner.

**B. None of the Authorities Cited by Midcal Stand for the Proposition that the Twenty-first Amendment Simply Allows a State to Prohibit or Restrict the Importation of Liquor Into a State; this Court Has Never So Held**

Beginning at page 42 of Midcal's brief, an attempt is made to support its position that the Twenty-first Amendment should be interpreted to only allow a state to either prohibit the importation of liquor into its borders or to place restrictions on its importation. Midcal cites the dissenting opinion of Mr. Justice Marshall in *California v. La Rue* (1972) 409 U.S. 109; *United States v. Tax Comm'n of Miss.* (1973) 412 U.S. 363; the California Supreme Court case of *Sail'er Inn, Inc. v. Kirby, Director of ABC* (1971) 5 Cal.3d 1; and *Lamp Liquors, Inc. v. Adolph Coors Co.* (1977) 563 F.2d 425. None of these cited authorities support the proposition contended for.

*California v. La Rue,* supra, in which Mr. Justice Marshall dissented from the majority opinion, involved



the validity of a state regulation alleged to interfere with rights protected by the First Amendment's guarantee of free speech. The regulation applied only to strictly local activity, i.e., the conduct within a licensed premise in California. Since the case dealt with a portion of the Constitution other than the Commerce Clause, i.e., the First Amendment, this Court considered the respective interests of the state in regulating liquor and of the First Amendment in protecting free speech and the majority concluded that the Twenty-first Amendment should prevail. Mr. Justice Marshall, in weighing the respective interests, concluded the First Amendment considerations should have prevailed. Mr. Justice Marshall's observation with regard to the language of § 2 of the Twenty-first Amendment, it would appear to Petitioner, should be read in the context of that case and the issues involved there rather than being cited as authority for such a drastic change in the federal-state roles.

Midcal likewise cites *United States v. Tax Comm'n of Miss.,* supra, as supporting its new interpretation of the Twenty-first Amendment. That case dealt with an attempt by the State of Mississippi to impose a tax upon the distributor of alcoholic beverages on a federal military enclave. The case is consistent with other cases of this Court.

As discussed in Petitioner's Opening Brief, page 40, the state's power to regulate liquor has been deemed not to include generally such regulation on federal enclaves. (See *Collins v. Yosemite Park & Curry Co.,* 304 U.S. 518.) Thus, the case is in no way inconsistent with this Court's

frequent statement that the power of the states to regulate liquor within their borders is "unfettered by the Commerce Clause." (*Ziffrin, Inc. v. Reeves* (1939) 308 U.S. 132, 138; *National Railroad Passenger Corp. v. Miller* (1973) 358 F.Supp. 1321, aff'd. 414 U.S. 948.)

*Sail'er Inn, Inc. v. Kirby, Director of ABC,* supra, involved a California statute, a part of the Act, prohibiting the employment of female bartenders. The California Supreme Court held the statute violated the Equal Protection Clause and the Federal Civil Rights Act. Although this case was not a decision of this Court, it is not necessarily inconsistent with this Court's decisions since it relates to provisions of the Constitution other than the Commerce Clause. (See *Craig v. Boren* (1976) 429 U.S. 190, re sex discrimination violating the Equal Protection Clause.) It could be argued that under *California v. La Rue,* supra, the Court could have determined that the statute was valid since one could find support for such a classification. (In fact, in the case of *Kraus v. Sacramento Inn* (1970) 314 F.Supp. 171, the Federal District Court for the Northern District of California held the same statute to be within the power granted to the state by the Twenty-first Amendment, and stated that it "does fall within those exclusive powers granted to the states by the Amendment and that it cannot be invalidated by the 1964 Civil Rights Act." At page 175.)

The final case advanced to support Midcal's argument is *Lamp Liquors, Inc. v. Adolph Coors Co.,* supra. The very quotation cited by Midcal destroys the case's precedential value in supporting Midcal's contention. As quoted on page



44 of Midcal's brief, the Twenty-first Amendment was described by that court as follows:

> ". . . Its *main purpose*, then, would appear to have been to give a dry state power to protect itself from importation of liquor into the state for use therein." (Emphasis added.)

Petitioner submits that the authorities cited by Midcal do not support the interpretation now contended for in respect to § 2 of the Twenty-first Amendment.

### C. Contrary to the Contention of the Solicitor General in this Case, Once a State Has Exercised Its Legislative Power Under the Twenty-first Amendment and Enacted Provisions Regulating the Sale of Liquor Within Its Borders, Which Have No Significant Extra-territorial Effect, Congress is Without Power, Under the Commerce Clause, to Preempt the State Legislation

In its "uncorrected typescript of the brief for the United States as amicus curiae" the Solicitor General, (apparently joined by the Federal Trade Commission[20] and seemingly likewise reflecting the views of the Bureau of Alcohol, Tobacco & Firearms,)[21] somewhat echoes the present argument of Midcal as to this new interpretation to be given to § 2 of the Twenty-first Amendment. However, whereas Midcal appears to be arguing for the imposition of its interpretation of the Twenty-first Amendment to apply only to the Sherman Act,, the brief of the United States urges a total reversal of the roles of the federal and state government in

---

[20]The "uncorrected typescript" of the brief of the United States, according to the signature lines, is joined in by "Michael N. Sohn, General Counsel, Federal Trade Commission."

[21]See p. 3 of the "uncorrected typescript" where the statement is made that "The United States is also responsible for enforcement of the Federal Alcohol Administration Act. . . ."

regulating liquor within a state's boundaries and contends that the Supremacy Clause bestows upon Congress the power to enact legislation regulating liquor within a state's boundaries and preempts any state regulatory provision regarding liquor that might be in conflict, irrespective of the Twenty-first Amendment. The United States position is well illustrated on page 3 of its "uncorrected typescript" in the following language:

> ". . . The United States thus has an interest in assuring that these laws ["Federal Alcohol Administration Act and the many other federal regulatory statutes (e.g., securities and labor laws)"] will not be subject to *de facto* revocation by the states *absent action by Congress subordinating its own power over interstate Commerce in liquor to that of the states.*" (Emphasis added.)

Again illustrating the United States complete repudiation of the present law relating to the regulation of liquor by a state within its borders is the following comment made on page 10 of the "uncorrected typescript", in referring to the California Supreme Court decision in *Rice (Corsetti):*

> ". . . a state law that is fundamentally inconsistent with federal law is unenforceable under the Supremacy Clause, . . ."

Again, on page 14 of the "uncorrected typescript," the United States demonstrates its rejection of the Twenty-first Amendment as a source of legislative power in the states with regard to regulating liquor within their borders with the following comment:

> ". . . The California statutes are accordingly preempted under established Supremacy Clause analysis."



(No authority interpreting the federal/state relationship in the regulation of liquor or the Twenty-first Amendment's relationship to the Commerce Clause is cited for this proposition.)

The United States further argues that the Federal Alcohol Administration Act, 27 U.S.C. 201 et seq., was "intended . . . the [sic] to override contrary state law. . . ." The United States cites only one case from this Court apparently for the proposition that the Federal Alcohol Administration Act overrides all "contrary state law" and that is the case of *Jamison & Co. v. Morgenthau* (1939) 307 U.S. 171, in which the Court, although questioning its own jurisdiction, affirmed the constitutionality of the Federal Alcohol Administration Act.

The urgings to this Court by the Solicitor General that it repudiate the long-established federal-state role in liquor regulation should be rejected as totally lacking in merit. As discussed in the next section the argument is not supported by any authority, cited or otherwise.

### D. The Only Decision of this Court Cited by the Solicitor General to Support His Contention that Congressional Acts Preempt State Liquor Regulation Within the Boundaries of a State Involved a Federal Regulatory Provision Prohibiting the Importation Into the United States of Improperly Labeled Scotch Whiskey; there was No State Law Involved

The only case of this Court, cited by the Solicitor General to support his total preemption argument is *Jamison & Co. v. Morgenthau,* supra. *Jamison* is an example of a case which demonstrates the meaning of the phrase "the Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause," (see *Craig v. Boren,* supra) but that

Congress retains the power under the provision of that clause (and the Export-Import clause, see *Department of Revenue v. James B. Beam Distilling Co.* (1964) 377 U.S. 341) to "regulate commerce with foreign nations." (See Appendix A to Pet. Open. Brief for text of Commerce Clause.)

The *Jamison* case involved a federal regulatory provision prohibiting the importation into the United States of improperly labeled Scotch whiskey. Additionally, there was in fact no state law involved. Consequently, the case only demonstrates that Congress does have power under the Commerce Clause to "regulate commerce with foreign nations."

*Hostetter v. Idlewild Liquor Corp.* (1964) 377 U.S. 324, likewise recognized the existence of this congressional power to regulate foreign trade. (See discussion of *Idlewild* in Pet. Open. Brief at page 38 and 39.)

However, under the Twenty-first Amendment and the Webb-Kenyon Act, it is clear that when a state regulatory provision relating to the control of liquor within its borders is in conflict with an Act of Congress passed under its powers to regulate interstate commerce, the state provisions prevail. (See discussion of *Castlewood* case, pages 41 and 42, Pet. Open. Brief.)

Obviously, if a state attempts to override Congress in the field of foreign trade, it is acting in excess of its power and must yield to the superior federal power as illustrated by the *Jamison* and *Idlewild* cases. However, when a state legislates concerning the sale, possession or consumption of alcohol within its borders, conflicting federal laws must yield to the state's constitutionally granted power.



To illustrate, by way of analogy to the effect of the Twenty-first Amendment, in the case of *Seaboard Air Line Ry. v. North Carolina* (1917) 245 U.S. 298, this court held that under the Webb-Kenyon Act, a state law, which required a railroad to disclose information, upon request, concerning consignees of liquor shipments, was a valid state requirement even though disclosing such information was forbidden by an Act of Congress, ("Act to Regulate Commerce," 36 Stat. 539.) passed under the Commerce Clause.

In the *National Railroad Passenger Corp. v. Miller* case (1973) 358 F.Supp. 1321, aff'd. at 414 U.S. 948, the Court held that if an Act of Congress passed under the Commerce Clause were construed as allowing service of liquor in violation of a Kansas regulatory law, the congressional act would be unconstitutional. (See Pet. Open. Brief, pages 28-30.)

In *U.S. v. Frankfort Distilleries* (1945) 324 U.S. 293, Justice Frankfurter, in his concurring opinion, declared that since the Sherman Act was enacted by Congress pursuant to the authority of the Commerce Clause, it is subordinate to state laws passed under the Twenty-first Amendment. Id. at 300-302.

In the *Castlewood* case, supra, it was held that a Florida liquor law prevailed over a conflicting regulation of the federal Bureau of Alcohol, Tobacco & Firearms. (See discussion of *Castlewood* in Pet. Open. Brief at pages 13, 41 and 42.)

When viewed in the light of the foregoing authorities, and the absence of contrary authority, the Solicitor Gen-

eral's contention that federal laws have preempted the states' powers in the liquor field is patently without merit.

The citation of the Third Circuit Court case of *Norman's on the Waterfront, Inc. v. Wheatley* on page 18 of the "uncorrected typescript" is misleading. The case does not stand for a limited interpretation of the Twenty-first Amendment—its holding was that under the Organic Act creating the territory, i.e., the Virgin Islands, the territory did not possess the power to enact this type of legislation.

The acceptance of the present views of the United States as presented by the Solicitor General with the apparent concurrence of the Federal Trade Commission would take away from the states a role that has been judicially recognized since at least *The License Cases* in 1830. That is, never during all of the years of federal/state "tug of war" over who regulated liquor in "interstate commerce" through the Wilson Act and Webb-Kenyon Act eras, and following those eras of uncertainty up to date, i.e., some approximately 150 years, the power of a state to regulate liquor within its borders where there was no extra-territorial effect or where the liquor was not being imported from a foreign country, has never been seriously questioned. The area of question about the states' power to regulate liquor arose under the Commerce Clause interpretation by this Court, shortly prior to the adoption of the Wilson Act, as to what constituted interstate commerce, where the Court had removed from the control of states the importation of liquor into their boundaries. (See Pet. Open. Brief., p. 11-12.)



The position now being argued for by the United States through the Solicitor General is a new position for the United States. That is demonstrated by a brief filed by the Solicitor General at the request of this Court in the case of *Heublein, Inc. v. So. Car. Tax Comm'n.* (1972) 409 U.S. 275.[22]

In that brief, the Solicitor General correctly analyzed and presented the law as to the meaning and effect of the Twenty-first Amendment as illustrated by the following quotation from pages 5 and 6 of that brief:

> "There appears to be no basis for questioning South Carolina's authority under the Twenty-first Amendment thus to control and localize the movement, distribution, and sale of alcoholic beverages, whether produced within or without the State. *State Board v. Young's Market,* 299 U.S. 59. As this Court pointed out in *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 325, 330:
>
> > 'This court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. . . .'
>
> "And the court added in *Department of Revenue v. James B. Beam Distilling Co.,* 377 U.S. 341, 346:
>
> > 'There can surely be no doubt either, of [a State's] plenary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption

[22] "This memorandum is submitted in response to the Court's order of February 29, 1972 inviting the Solicitor General to express the views of the United States." (First page of the text of that brief.)

of intoxicants within her territory after they have been imported . . .'

"South Carolina's controls over liquor produced in other states are of a piece with the control over liquor produced within the State. . . ."

Surely it should make no difference in the presentation of arguments to this Court insofar as the correctness of the analysis is concerned whether the Solicitor General has been invited to submit a brief on behalf of the United States by this Court or whether the Solicitor General submits a brief apparently in part at least on behalf of other federal agencies. Petitioner would submit that the brief filed by the Solicitor General on behalf of the United States in the *Heublein* case was a correct analysis of the law, and would point out that there has been no change of any kind or nature in the interim to justify a new interpretation of the Twenty-first Amendment taking away from the states the power they have had and exercised for approximately 150 years.[23]

Petitioner would respectfully urge that the contention being made by the United States, in effect, that the federal government should replace the state governments in the field of liquor regulation within the states' border should be rejected and the states be allowed to exercise their traditional power as guaranteed by the Twenty-first Amendment.

---

[23]Thus, if the position of the United States were adopted that any congressional legislation would preempt the states' regulatory powers in the field of liquor regulation, the so-called "monopoly" states would be subject to Congress as to whether or not they could in fact engage in the business of distributing and selling liquor, and indeed, fixing the prices as the sole distributor of liquor within a state. (See fn. 1, p. 4, Pet. Open. Brief.)



**E. The Limited Concept of what Constituted Inter-state Commerce, as Enumerated by this Court, at the Time of the Ratification of the Twenty-first Amendment in 1933 Made Unnecessary Any Language in Section 2 Specifically Covering the Regulation of Liquor Within the States' Borders Since the States Already Possessed that Power**

Midcal emphasizes, in advancing its "importation" only interpretation of § 2 of the Twenty-first Amendment, that in the legislative history and debates concerning the Wilson Act, the Webb-Kenyon Act, and the Twenty-first Amendment, the emphasis appeared to be on the need for the states to have the power to prohibit or restrict the importation of liquor into their states. What this argument overlooks is that during the period of the debates on the two statutory provisions and the Twenty-first Amendment, the states clearly had the power, and in fact exercised it, to regulate liquor within their borders. The problem developed because the Commerce Clause, after *The License Cases,* and before the adoption of the Wilson Act, was interpreted to prevent a state from prohibiting or restricting imports into its borders. In the Wilson Act, Congress attempted to remove that interpretation of the Commerce Clause. In the Webb-Kenyon Act, Congress sought to further strengthen the states' position with respect to the then concept of interstate commerce by "removing liquor from interstate commerce." Further, at the time of the debates on the resolution which became the Twenty-first Amendment and its ratification, the concept of what constituted interstate commerce remained basically the same, i.e., the states retained the full power to regulate liquor within their borders. Therefore, the emphasis on "importation" into the state was understandable since it was indeed

the "main consideration." However, to argue from that situation that therefore the Twenty-first Amendment goes no further than to allow the states to either prohibit or restrict the importation of liquor, and therefore, in effect, takes away from the states their traditional power to regulate liquor within their borders and to further argue that the states' powers were limited to the 1933 interpretation of the reach of the Commerce Clause is illogical, unreasonable, contrary to established constitutional principles and is likewise contrary to the decisions of this Court which have over and over again confirmed the states' power under the Twenty-first Amendment to regulate liquor within their borders.

What Midcal is asking this Court to rule is that the concept of what constitutes interstate commerce under both the Webb-Kenyon Act and the Twenty-first Amendment should be "frozen" as it existed in 1933 when the Twenty-first Amendment was ratified and/or 1935 when the Webb-Kenyon Act was re-enacted, insofar as a state's power to regulate liquor within its borders "unfettered by the Commerce Clause" is concerned.

It should go without saying that if the concept of what constitutes interstate commerce under the Commerce Clause has been expanded to reach into almost every aspect of trade, business or commerce within a state, that it is equally reasonable and constitutionally required that the concept be interpreted in the same fashion as far as the effect of the Twenty-first Amendment on the Commerce Clause.

Before the events of the 1930's triggered the trend by this Court toward an expansive "substantial effect" analysis



of the Commerce Clause, it was accepted law that the Commerce Clause applied predominately to goods only while in the stream or current of interstate commerce. (Cf. *Labor Board v. Jones & Laughlin* (1936) 301 U.S. 1, and *Schechter Corp. v. United States* (1935) 295 U.S. 495.)

The power of Congress to regulate interstate commerce under the Commerce Clause and thereby supersede the state's power over commerce was limited to that time when the goods were in the actual flow of interstate commerce and had not yet "come to rest" within a state's borders. Congressional power was limited to cases where goods were being held for future use or sale with respect to an interstate transaction, i.e., goods temporarily within a state. (*Schechter Corp. v. United States,* supra, at page 543, and *Swift & Co. v. United States* (1905) 196 U.S. 375.)

The limited construction of the Commerce Clause, at that time (1935), was reflected, for instance, in the effect given to the Sherman Act. Anti-competitive acts had to have a "direct" effect on interstate commerce.

> "The distinction between direct and indirect effects has been clearly recognized in the application of the Antitrust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. [omit cites] But where the intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute notwithstanding its broad provisions. . . ." (*Schechter Corp. v. United States,* supra, at 547.)

It would appear that the California regulatory provisions involved in this proceeding, even in the absence of the Twenty-first Amendment or the Webb-Kenyon Act, would not have violated the Sherman Act in 1933. The Commerce Clause would simply have been held not to extend into these intrastate activities of the state at that time. This analysis is supported by *Old Dearborn Co. v. Seagram Corp.* (1936) 299 U.S. 183, where this court *validated* an Illinois fair trade law (before the Miller-Tydings Act) against a Sherman Act challenge, which was included among other contentions advanced as to reasons for declaring its invalidity.

At the time of the ratification of the Twenty-first Amendment, if the alleged anti-competitive conduct was seen not to constitute commerce under the then interpretation of what constituted "interstate commerce", the Commerce Clause based Sherman Act would not have been applicable. (See *United States v. E. C. Knight Co.* (1895) 156 U.S. 1 [manufacturing not commerce].)

The historical analysis makes evident why the word "importation" was used in drafting the Twenty-first Amendment in 1933. What was required at that time to give the states *full* power over the regulation of liquor was to remove liquor from the "current" of interstate commerce at the borders of the state. The states already had the power to regulate any goods, including liquor, once the article was no longer in the "flow of commerce". The framers of the Twenty-first Amendment, including the state constitutional conventions that ratified the Amendment, surely could not have intended the Twenty-first



Amendment to limit the regulatory powers which the state already possessed. At the time of the ratification of the Twenty-first Amendment, any specific reference to regulation by the states within their borders would have been mere surplusage.

The net effect of the Commerce Clause and the Twenty-first Amendment, when read in light of each other at the time of the adoption of the Twenty-first Amendment was to remove liquor from the current of interstate commerce and from the normal operation of the Commerce Clause, i.e., the roles of the federal and state governments were "reversed." The plenary legislative power of the states was not diminished by the ratification of the Twenty-first Amendment, instead it was enlarged at the expense of the Commerce Clause which was to be applied only where interstate commerce effects extended beyond the state's borders. (See *U.S. v. Frankfort Distilleries* (1945) 324 U.S. 293.)

Midcal's present contention would render the Twenty-first Amendment meaningless, eliminate the states' power to regulate liquor within their borders, and ultimately lead to the creation of an entirely new and comprehensive federal regulatory system to replace the comprehensive state regulatory systems now in existence.

Petitioner submits that the Twenty-first Amendment has been properly interpreted by this Court in the years following its ratification, and that the states' regulatory powers under this Amendment are "unfettered by the Commerce Clause" no matter what the extent of the effect of that clause might otherwise be, either now or in the future.

It is a fundamental precept of constitutional construction that meaningless or purposeless interpretations of clauses are to be avoided. (*Marbury v. Madison* (1803) 5 U.S. 137 and *United States v. Butler* (1935) 297 U.S. 1, 65.) Effect is required to be given to every part of the Constitution. (*Wright v. U.S.* (1938) 302 U.S. 583, 588.) This Court has often said that the Twenty-first Amendment and the Commerce Clause must be read in *pari materia.* (See, for example, *California v. La Rue* (1972) 409 U.S. 109.)

In order to give the Twenty-first Amendment its due position in the constitutional scheme of things, the contentions of Midcal and the United States, which would render the Amendment meaningless, must be rejected.

### F. None of the Cases of this Court Cited by Either Midcal or the United States Support their Positions and the Arguments of Both Should Be Rejected

In addition to the various decisions of this Court cited by Midcal and the United States, none of which support their present positions, there are two other cases cited by Midcal that Petitioner would briefly discuss.

Midcal cites *Jatros v. Bowles,* 143 F.2d 453 (1944), and *Burke v. Ford*, 389 U.S. 320 (1967) for the scope of the federal power to affect liquor within a state's borders. (Midcal Brief, pages 59 and 55) Neither case can be interpreted to support Midcal's position in this case.

In *Jatros v. Bowles*, supra, the Sixth Circuit held that under the Emergency Price Control Act, the federal government could regulate the maximum price of liquor sold by the drink. The Emergency Price Control Act was enacted during World War II pursuant to the federal government's war powers. Petitioner would not seriously argue that the Twenty-first Amendment would not generally yield to a valid exercise of the War Power just as other sections of the Constitution often yield.



*Burke v. Ford, supra,* is an example of a case where the federal antitrust laws applied because of the absence of any exercise of the states' power under the Twenty-first Amendment. In that case, a private suit was brought under the Sherman Act to enjoin a horizontal division of market territories by all Oklahoma wholesalers where there was *no* state statute involved. There was no attempt to invalidate a state statute. The conduct involved was not pursuant to any act of the state but was solely the action of private parties. There was no state statute to be preempted. (See *U.S. v. Frankfort Distilleries,* supra.)

In the arguments now being made by Midcal and the United States in this matter, both fail to discuss the proper roles of the federal and state governments in keeping with the frequent pronouncement by this Court that a state, in the regulation of liquor within its borders, is "unfettered by the Commerce Clause." They also fail to cite any case of this Court to support the *Rice (Corsetti)* rationale which involved the Twenty-first Amendment and the Commerce Clause which did not involve some other section of the Constitution, such as the First Amendment, the Fourteenth Amendment, or the Export-Import Clause, or foreign commerce, or extraterritorial effects of regulation within a state. These failures are significant! They must be taken as amounting to an abandonment of the erroneous *Rice (Corsetti)* rationale.

Petitioner would urge this Court to reject the preemption theory being advanced by the United States, to reject the "importation" only basis of Midcal's arguments, and the "balancing of interests" test created by the California Supreme Court, and reaffirm the long line of judicial precedent from this Court confirming the state's power to regulate liquor within its borders under the Twenty-first Amendment "unfettered by the Commerce Clause."

## V

## THE CONDUCT OF THE WINE PRODUCERS IN THIS CASE IS NOT "PRIVATELY INITIATED" BUT IS COMPELLED BY THE STATE LEGISLATURE AND ITS DETERMINATION AS TO THE METHOD BY WHICH THE PURPOSES OF THE COMPREHENSIVE LEGISLATIVE SCHEME WILL BE ACCOMPLISHED IS PROPERLY LEFT TO THE LEGISLATURE AND THE STATUTORY PROVISIONS ARE EXEMPT FROM THE SHERMAN ACT UNDER THE "STATE ACTION" DOCTRINE

At pages 61 through 63 of the Midcal brief it is contended that Congress intended for the repeal of the Miller-Tydings, (50 Stat. 693), and McGuire, (66 Stat. 632), Acts to invalidate all fair trade legislation. Midcal correctly points out that congressional intent is significant in antitrust issues. However, Midcal then incorrectly interprets the repeal of Miller-Tydings as an indication that Congress intended the antitrust laws to invalidate liquor fair trade laws and as a result comes to a conclusion that the "state action" doctrine does not apply in this case.

Both Houses of Congress made the intended effect on liquor fair trade laws clear. Congress expressly stated that the repeal of Miller-Tydings and McGuire was intended to have no effect on the immunity from the Sherman Act that was enjoyed by state liquor fair trade laws under the



Twenty-first Amendment. The intent of the Senate was made clear in the Report of the Senate Judiciary Committee at the time the McGuire and Miller-Tydings Acts were repealed:

> "Liquor will not be affected by the repeal of the fair trade laws in the same manner as other products because the Twenty-first Amendment to the Constitution gives the states broad powers over the sale of alcoholic beverages. Thus, while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do so in states which pass price fixing statutes pursuant to the Twenty-first Amendment." (S. R. Rep. No. 446, 94th Cong., First Sess., p. 2 (1975).)

The House of Representatives also made it clear that it intended liquor fair trade laws to remain exempt from the Sherman Act:

> "Some concern was expressed in the hearings before the subcommittee that the repeal of Miller-Tydings and McGuire might impinge in some fashion upon the power of states to regulate liquor traffic under the second section of the Twenty-first Amendment. *No such effect is intended. . . .*" (Emphasis added.)
>
> (H. R. Rep. No. 94-341, 94th Cong., First Sess., p. 3, n.2 (1975).)

The "state action" doctrine is an implied exemption which was developed by this Court in order to further Congress's intent that certain state laws be exempt from the antitrust laws. (*Parker v. Brown* (1943) 317 U.S. 341). Midcal claims that the repeal of Miller-Tydings and McGuire was intended to subject state liquor laws to the Sherman Act prohibitions. But since Congress has stated

that "no such effect is intended", this Court should likewise give the repeal no such effect.

It does not appear that the "state action" exemption has been discussed by this Court in cases involving the state regulation of liquor, as was done in *Rice (Corsetti)*. In *Rice (Corsetti)*, the California Supreme Court rejected the application of the "state action" exemption not because it was a liquor case, but because of its conclusion that the conduct required by the statute was "privately initiated" and that the state did not "supervise" the establishment or amount of the minimum prices required by the state law. Given the scope and breadth of the Twenty-first Amendment, both as interpreted by this Court, its legislative history and the intent of the people of the United States in adopting it, the reason the "state action" exemption has not been discussed by this Court in connection with liquor cases is obvious. It has never been necessary to use it to "save" a state regulatory provision relating to liquor. The scope and breadth of the Twenty-first Amendment is clear and since the state regulatory provisions in this case and in *Rice* (*Corsetti*) and *Capiscean* are clearly within the state's power to regulate liquor under the Twenty-first Amendment that should end the question.

Both the United States and Midcal argue that the California regulatory provisions do not meet the tests for the application of the doctrine as laid down by this Court in earlier decisions. As stated in Petitioner's Opening Brief and Petition for Writ of Certiorari, the state regulatory



provisions involved here do fit within the "state action" exemption.

Midcal's "privately initiated" conduct argument seems to come basically from the California Supreme Court's language in *Rice* (*Corsetti*), 21 Cal.3d at page 444, in which it appears that the California court over-emphasized and misapplied some language in the case of *Cantor v. Detroit Edison Co.*, 428 U.S. 579. It would appear to be illogical to describe conduct of the producers of wine in setting the price of their product to be "privately initiated" when it is required by California laws. In *Cantor*, the failure to qualify for a "state action" exemption was based upon two factors:

(1) The furnishing of free light globes was not part of a comprehensive statutory scheme by the state and therefore obviously not necessary to that scheme's proper operation, and

(2) The State did not require the conduct. The conduct had simply been authorized, in effect, by the approval of the State Public Utilities Commission of a rate schedule which included that feature.

In the case of *Lafayette v. Louisiana Power & Light Co.* (1978) 435 U.S. 389, this Court described the City of Lafayette as an entity falling somewhere between a "state" and a private person. That case does not stand for the proposition that it was the "state" acting. The tie-in sales of electric power with gas which were required of customers by the city, were therefore "privately initiated." This Court sent the case back to the lower court to determine whether or not the privately initiated conduct was "required" by

the state as opposed to simply authorized. If the conduct was required, it was exempt under the "state action" exemption even if it was "privately initiated."

In *Parker v. Brown,* supra, the growers of raisins initiated the action that eventually led to the fixing of the price of raisins. The conduct of the growers was not required since unless a majority of the growers in a district agreed to a price-fixing program, none was in fact instituted. Therefore, the program could be described as optional rather than required. Additionally, although the program initiated by the growers was subject to review by a commission of growers, after that review the matter was again submitted to the growers. If a majority of the growers did not accept the program as modified by the commission, the growers would not be bound under the plan and would not be required to sell at the fixed price. In short, the price-fixing program was privately initiated.

An important consideration in determining whether a "state action" exemption is applicable in any particular situation is whether or not the conduct is required or commanded by the state. *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, held that if the conduct is initiated by a private group and is not required by the state, the conduct will not be exempt from the Sherman Act under the "state action" exemption.

However, if private conduct is required by the Legislature and the requirement is part of a comprehensive statutory scheme enacted for the purpose of displacing



competition and replacing it with regulation, the conduct would be exempt from the antitrust laws. As this Court recently stated in *New Motor Vehicles Bd. of Cal. v. Orrin W. Fox Co.* (1978) 439 U.S. 96:

> "Appellees next contend that the Automobile Franchise Act conflicts with the Sherman Act, 15 U.S.C. § 1 et seq. They argue that by delaying the establishment of automobile dealerships whenever competing dealers protest, the state scheme gives effect to privately initiated restraints on trade, and thus is invalid under *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384 (1951).
>
> "The dispositive answer is that the Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the "state action" exemption. *Parker v. Brown . . . Bates v. State Bar of Arizona . . . City of Lafayette v. Louisiana Power & Light Co. . . .*" Id. at p. 109.
>
> "Appellees also argue conflict with the Sherman Act because the Automobile Franchise Act permits auto dealers to invoke state power for the purpose of restraining intrabrand competition 'This is merely another way of stating that the . . . statute will have an anti-competitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our charter of economic liberty. . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the states'

power to engage in economic regulation would be effectively destroyed.' *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 133 (1978)." Id. at pp. 110-111.

At pages 66 through 70 of Midcal's brief, it asserts, as did the California Supreme Court in the *Rice* (*Corsetti*) case, that price maintenance provisions of the Act are not necessary to the state's regulation of alcoholic beverages and that they are ineffective. Midcal suggests that there are other alternatives available to the Legislature by which it can promote temperance and insure orderly marketing conditions at the retail level.

Petitioner submits that the particular method chosen by the state to regulate a particular matter should be left to the state Legislature. If the state chooses to regulate prices at the retail level to promote temperance, to insure orderly marketing conditions, to protect small businessmen from predatory and monopolistic practices, and if it chooses to regulate the price of liquor from the wholesale to retail level for the purpose of preventing discrimination by wholesalers among similarly situated retailers, and to aid in the enforcement of unfair practices provisions, the Legislature should be allowed to choose the method for regulating prices which, in the wisdom of the Legislature, is deemed to be the best method for accomplishing those ends. In the realm of price-fixing, there are a number of different methods that have been chosen by state Legislatures around the country. Many of the states have chosen to create a monopoly in the distribution and sale of liquor and the state itself is in the business of dispensing liquor. (See Pet. Opening Brief, fn. 1, p. 4.) In many of those



cases, the state has a complete and total monopoly within its borders and sets the prices.

A Legislature could also institute a program that was apparently suggested by the California Supreme Court when it reflected on the lack of supervision over prices, which would include holding price hearings to set prices at wholesale to retail and retail to consumer for the thousands of brands of beer, wine and distilled spirits. With inflation, ever-changing costs, hundreds of producers and with the political considerations that would pervade such hearings, hearings would be very frequent and expensive. The State of Kansas had such a program relating to distilled spirits for a number of years, and this past legislative session abandoned that program and enacted a minimum markup system. (See fn. 15 in section II on "mootness", supra, this brief.)

Another obvious method that could be used to fix the minimum prices for liquor within a state's borders would be to allow the distillers or producers to set the prices of their products at both the wholesale and retail level. This was the system adopted by the California Legislature for distilled spirits at retail, prior to the *Rice* (*Corsetti*) case. In the case of wine, the producer generally sets the price of wine from wholesale to retail and retail to consumer. However, there are several exceptions wherein a retail brand owner of wine sets his own price at retail and where the wholesaler himself sets his own price. (See fn. 14 in section II on "mootness", supra, this brief.)

In California, at present, the wine statutes still are a mixture of fair trade contracts and "effective price schedules" as illustrated by §§ 24862 and 24866.

Petitioner respectfully submits that any inquiries into the validity of a statute should not include a judicial determination as to the necessity, effectiveness or propriety of the statute as is urged by Midcal and espoused by the California Supreme Court. As this Court stated:

> "... And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of Legislative power." (*Nebbia v. People of the State of New York* (1934) 291 U.S. 502, 537-38.)

California has a comprehensive, detailed scheme of regulation, including the regulation of prices, the basis of which are clearly enunciated by legislative declaration in the California Act as being to promote temperance, encourage orderly marketing conditions and to prevent discrimination and unfair practices. These provisions are an important part of this comprehensive scheme and therefore are exempt from the Sherman Antitrust Act under the "state action" exemption.



The *Parker v. Brown* line of cases focused mainly on three factors which determined the applicability of the "state action" exemption. These factors are (1) the status of the person to be restrained, i.e., is the defendant the state or acting under authority of the state?, (2) to what extent does the state command or supervise the conduct?, (3) the existence and importance of a state policy that results in the restraint. *Princeton Community Phone Book, Inc. v. Bate* (1978) 582 F.2d 706, 716; *Mobilfone v. Commonwealth Telephone Co.* (1978) 571 F.2d 141.

The status of the person who Midcal seeks to restrain in this case is the State Director of Alcoholic Beverage Control. The private conduct involved in this case, just as in the case of lawyers who did not compete by refusing to advertise in *Bates v. State Bar of Arizona*, is the result of an act of the state acting as sovereign. The command from the state is absolute in this case. The licensees have no discretion, they must file price schedules or fair trade contracts. The statutes which compel this conduct are part of a comprehensive state regulatory act. The existence and extreme importance of the policy of state regulation of liquor has been recognized by several Acts of Congress, a constitutional amendment and numerous opinions by this Court. The interest of the state in controlling the sale and use of liquor goes to the core of the state's power to protect the public. The interest in regulating liquor is much greater than the interest of controlling the activities of State Bar members as in *Bates v. State Bar of Arizona* or in controlling the activities of raisin producers as in *Parker v. Brown*. The "privately initiated" conduct aspect

of the "state action" exemption has been overstated by Midcal and the United States and is in conflict with this Court's holdings in the *Cantor, Lafayette* and *Fox* cases.

## VI
## CONCLUSION

Based upon over forty years of consistent application of the Twenty-first Amendment by this Court, and by approximately 150 years of continuously recognized state power to regulate liquor within their borders, and the fact that all of the states have based their liquor control provisions upon the interpretations of the Twenty-first Amendment, and the states' traditional role in regulating liquor within their borders, this Court should declare the California regulatory provisions involved to be valid enactments under the Twenty-first Amendment. This Court should further reject the argument that the Twenty-first Amendment should be interpreted to allow a state to only prohibit or restrict imports as contended for by Midcal. This Court should further reject the argument of the United States that Congress may pre-empt a state statute regulating liquor within a state's borders that is enacted under the Twenty-first Amendment.

And finally, this Court should reverse the decision in the instant case and *overrule* the *Rice (Corsetti)* and *Capiscean* cases.

LAW OFFICES OF
WILLIAM T. CHIDLAW
A PROFESSIONAL CORPORATION
*Attorney for Petitioner*

**Exhibits Follow**

# EXHIBITS

**Exhibit A**

Before the
Department of Alcoholic Beverage Control
of the State of California

File 40373
Reg. 13368

In the Matter of the Accusation against
Grape Empire Wine Co., Inc.
dba Grape Empire
140 Hegenberger Loop
Oakland
Respondent and Licensee
under the Alcoholic Beverage Control Act.

Certification

State of California
County of Sacramento } ss

I, C. E. Cameron, Jr., do hereby certify that I am the duly appointed, qualified and acting Chief Counsel of the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that official files of the Department show that the attached accusation was registered by the Sacramento Headquarters Office of said Department on December 5, 1979.

In Witness Whereof, I hereunto affix my signature this 28th day of December, 1979, at Sacramento, California.

/s/ C. E. Cameron, Jr.
C. E. Cameron, Jr.
Chief Counsel

State of California
Department of Alcoholic Beverage Control

File 40373
Reg. 13368
License Nos. 09, 12, 17, 18, 20

In the Matter of the Accusation against
Grape Empire Wine Co., Inc.
dba: Grape Empire
Respondent(s)

Premises: 140 Hegenberger Loop, Oakland
License(s): Beer & Wine Importer, Distilled Spirits Importer, Beer & Wine Wholesaler, Distilled Spirits Wholesaler & Off-sale Beer & Wine

[Received Oct. 4, 1979]

## ACCUSATION

Under Alcoholic Beverage Control Act
and State Constitution

I hereby complain and accuse the above respondent(s), holding the above license (s), based on the following statement of fact:

### COUNT I

On or about August 30, 1979, the above-named wholesale licensee sold and delivered wines, as listed below, to Mary B. Condon and John F. White, dba California Wine & Cheese, 2800 Leavenworth Street, San Francisco, a retail licensee, at prices other than specified prices filed for said wines with the Department, in violation of Section 24862 of the Business and Professions Code, State of California and Rule 101, Title 4, California Administrative Code.



| Invoice # | Wine | Bottle Size | Invoice Case Price | Posted Case Price |
|---|---|---|---|---|
| 6232 | 1 cs. Geyser Peak, Fume Blanc | 750 ml. | $34.00 | $36.00 |
| 6232 | 1 cs. Angelo Papagni, Brut Champagne | 750 ml. | 35.00 | 40.00 |

### COUNT II

On or about August 3, 1979, the above-named wholesale licensee sold and delivered Geyser Peak, Chardonnay wines, as listed below, to Victoria Station, Inc., dba Quinn's Lighthouse, 51 Embarcadero Cove, Oakland, a retail licensee, at prices other than specified prices filed for said wine with the department, in violation of Section 24862 of the Business and Professions Code, State of California and Rule 101, Title 4, California Administrative Code.

| Invoice # | Bottle Size | Invoice Case Price | Posted Case Price |
|---|---|---|---|
| 5097 | 750 ml. | $38.50 | $40.50 |
| 5097 | 375 ml. | 41.00 | 43.00 |

### COUNT III

On or about August 24, 1979, the above-named wholesale licensee did give unlawful discounts in connection with the sale and delivery of Charles Krug wines to Lucky Stores, Inc., a retail licensee, on invoice #5951, by allowing said retail licensee a 15% quantity discount, in violation of Sections 24871 and 24878 of the Business and Professions Code, State of California.

### COUNT IV

On or about August 9, 1979, the above-named wholesale licensee did give unlawful discounts in connection with

the sale of Ambassador Brut Champagne to Monterey Wine Company, dba California Wine Merchant, 3237 Pierce Street, San Francisco, a retail licensee, on invoice #5347, by allowing said licensee a 10% quantity discount, a F.O.B. cash discount when no such F.O.B. price was contained in the price schedule filed by the winery, and an additional 2% cash discount at time of delivery, said discounts totaling 15.73%, in violation of Sections 24871 and 24878 of the Business and Professions Code, State of California.

Licensee(s) Previous Record: Licensed as a Beer & Wine Importer, Beer & Wine Wholesaler and Off-sale Beer & Wine since 1-14-77. Licensed as a Distilled Spirits Importer and a Distilled Spirits Wholesaler since 8-28-78. No record of any disciplinary action.

(1) That by reason of the foregoing facts, grounds for suspension or revocation of such license(s) exist and the continuance of such license(s) would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200(a), Business and Professions Code;

(2) That additional grounds for suspension or revocation under Section 24200 (b) (—) (—), Business and Professions Code, exist in that respondent(s) have violated, or permitted the violation of:

(a) Business and Professions Code Section(s) Count I & II—24862; Count III & IV—24871 and 24878

(b) Title IV, Cal. Admin. Code, Rule(s) Count I & II—Rule 101

(c) Other law: .....



WHEREFORE, I recommend that a hearing be held on this accusation.

Dated this 3 day of October, 1979.

/s/ FRED CORTI
District Administrator
Department of Alcoholic
Beverage Control

Reviewed: /s/

**Exhibit B**

Before the
Department of Alcoholic Beverage Control
of the State of California

File 59698
Reg. 13366

In the Matter of the Accusation against
Wine Action, Inc.
1620 Armstrong Avenue
San Francisco, CA
Respondent and Licensee
under the Alcoholic Beverage Control Act.

State of California
County of Sacramento } ss

Certification

I, C. E. Cameron, Jr., do hereby certify that I am the duly appointed, qualified and acting Chief Counsel of the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that official files of the Department show that the attached accusation was registered by the Sacramento Headquarters Office of said Department on December 5, 1979.

In Witness Whereof, I hereunto affix my signature this 28th day of December, 1979, at Sacramento, California.

/s/ C. E. Cameron, Jr.
C. E. Cameron, Jr.
Chief Counsel

State of California
Department of Alcoholic Beverage Control

File 59698
Reg. 13366
License Nos. 9, 12, 17, 18, 20

In the Matter of the Accusation against
Wine Action, Inc.
Respondent(s)

Premises: 1620 Armstrong Avenue
San Francisco, CA
License(s): Beer & Wine Importer,
Distilled Spirits Importer, Beer & Wine
Wholesalers, Distilled Spirits, Wholesalers
& Off-Sale Beer & Wine

ACCUSATION
Under Alcoholic Beverage Control Act
and State Constitution

I hereby complain and accuse the above respondent(s), holding the above license(s), based on the following statement of fact:

COUNT I

On or about July 11, 1979, the above-named wholesale licensee did give unlawful discounts in connection with the sale and delivery of Cribari and Franzia wines, as described below, to Ernest L. Sarlatte, dba Avenue Liquors, 3051-53 Telegraph Avenue, Berkeley, a retail licensee, by allowing said retailer a quantity discount when such quantities purchased by said retailer did not qualify, for a quantity dis-



count in accordance with the quantity discount schedules on file with the Department, in violation of Sections 24862 and 24878 of the Business and Professions Code, State of California and Rule 101, Title 4, California Administrative Code.

| Invoice Number | Cases Purchased | Brand | Size Bottles | Discount Allowed |
|---|---|---|---|---|
| 16205 | 3 | Cribari, Sweet Vermouth | 1.5 liter | 2% |
| 16205 | 1 | Franzia, Cabernet Sanvignon | 1.5 liter | 5% |
| 16205 | 1 | Franzia, Chenin Blanc | 1.5 liter | 5% |
| 16205 | 1 | Franzia, French Colombard | 1.5 liter | 5% |

COUNT II

On or about August 2, 1979, the above-named wholesale licensee sold and delivered 10 cases of Geyser Peak Chablis in 750 ml. size bottles on invoice #16837 to Holiday Inns, Inc. 480 Sutter Street, San Francisco, a retail licensee, at prices less than specified prices including applicable discounts filed for said wine in price or quantity discount schedules on file with the Department, in violation of Sections 24862 and 24878 of the Business and Professions Code, State of California and Rule 101, Title 4, California Administrative Code.

COUNT III

On or about August 7, 1979, the above-named wholesale licensee sold and delivered, as described below, Geyser Peak Fume Blanc V in 750 ml. size bottles to Le Central, Inc., 453 Bush Street, San Francisco, a retail licensee, at a price or quantity discount other than the price or quantity discount contained in price or quantity discount

schedules on file with the Department, in violation of Sections 24862 and 24878 of the Business and Professions Code, State of California and Rule 101, Title 4, California Administrative Code.

| Invoice Number | Invoice Case Price | Posted Case Price | Cases Sold | Quantity Discount Given | Quantity Discount Allowed Per Posted Schedule |
|---|---|---|---|---|---|
| 16956 ..... | $32.00 | $36.00 | 6 | 10% | 6% |

COUNT IV

On or about August 8, 1979, the above-named wholesale licensee sold and delivered, as described below, Wente Bros, Blanc De Noir in 750 ml. size bottles to Edward Dair, dba Avenue Liquors, 3051-53 Telegraph, Berkeley, a retail licensee, at prices other than specified prices filed for said wines with the Department, in violation of Section 24862 of the Business and Professions Code, State of California and Rule 101, Title 4, California Administrative Code.

| Invoice Number | Cases Sold | Invoice Price Per Case | Posted Price Per Case |
|---|---|---|---|
| 16978 ..... | 1 | $25.80 | $30.00 |

Licensee(s) Previous Record: Licensed since September 11, 1978. No previous disciplinary action.

(1) That by reason of the foregoing facts, grounds for suspension or revocation of such license(s) exist and the continuance of such license(s) would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200(a), Business and Professions Code;

(2) That additional grounds for suspension or revocation under Section 24200 (b) (  ) (  ), Business and Professions Code, exist in that respondent(s) have violated, or permitted the violation of:



(a) Business and Professions Code Section(s) Counts I through IV - 24862 Counts I through III - 24878

(b) Title IV, Cal. Admin. Code, Rule(s) Counts I through IV - Rule 101

(c) Other law:

Wherefore, I recommend that a hearing be held on this accusation.

Dated this 28th day of Sept. 1979.

/s/ Fred Corti
for District Administrator
Department of
Alcoholic Beverage Control

Reviewed: /s/

**Exhibit C**

Before the
Department of Alcoholic Beverage Control
of the State of California

File 52016
Reg. 11123

In the Matter of the Accusation against
Mission Imports, Inc.
Mission Cellars Ltd.
Beverage Marketing Assoc.
550 S. Mission Road
Los Angeles
Respondent and Licensee
under the Alcoholic Beverage Control Act.

Certification

State of California
County of Sacramento } ss

I, C. E. Cameron, Jr., do hereby certify that I am the duly appointed, qualified and acting Chief Counsel of the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that official files of the Department show that the attached accusation was registered by the Sacramento Headquarters Office of said Department on December 27, 1978.

In Witness Whereof, I hereunto affix my signature this 28th day of December, 1979, at Sacramento, California.

/s/ C. E. CAMERON, JR.
C. E. Cameron, Jr.
Chief Counsel

State of California
Department of Alcoholic Beverage Control

File 52016
Reg. 11123
License Nos. 09, 17

In the Matter of the Accusation against
Mission Imports, Inc.
dba Mission Cellars Ltd.
dba Beverage Marketing Assoc.
Respondent(s)
Premises: 550 S. Mission Road
Los Angeles
License(s): Beer & Wine Wholesaler;
Beer & Wine Importer

[Received Dec. 27, 1978]

ACCUSATION
Under Alcoholic Beverage Control Act
and State Constitution

I hereby complain and accuse the above respondent(s), holding the above license(s), based on the following statement of fact:

COUNT I

On or about November 1, 1978, respondent-licensee did sell and cause to be sold to Von's Grocery Co., 10150 Lower Azusa Rd., El Monte, an off-sale general licensee, items of wine, to-wit: 7000 cases Franzia Champagne (750 ml), 1000 cases Franzia Cold Duck (750 ml), 3000 cases Franzia Spumante (750 ml), and 1000 cases Franzia Pink Champagne (750 ml), at prices less than the selling prices as posted in the then effective price schedule duly filed with the Department by Franzia Brothers Winery, on September 15, 1978.



COUNT II

On or about November 1, 1978, respondent-licensee did sell and cause to be sold to Von's Grocery Co., 10150 Lower Azusa Rd., El Monte, an off-sale general licensee, items of wine, to-wit: 1800 cases of ½ gal bottles of Sebastiani Mt. French Columbard and 3000 cases of ½ gal bottles of Sebastiani Mt. Chenin Blanc at prices less than the selling prices as posted in the then effective price schedule duly filed with the Department by Sebastiani Vineyards, Inc., on October 11, 1978.

COUNT III

On or about November 1, 1978, respondent-licensee did sell or cause to be sold to Von's Grocery Co., 10150 Lower Azusa Rd., El Monte, an off-sale general licensee, two orders of wine, to-wit: 12000 cases of 750 ml bottles Franzia sparkling wines, and 4800 cases of ½ gal bottles of Sebastiani wines, in each instance at prices with allowed quantity discounts in excess of the maximum 10% case discount.

Licensee(s) Previous Record: So licensed since 1/6/76 with no record of disciplinary action.

(1) That by reason of the foregoing facts, grounds for suspension or revocation of such license(s) exist and the continuance of such license(s) would be contrary to public welfare and morals, as set forth in Article XX, Section 22,

State Constitution, and Section 24200(a), Business and Professions Code; ALL COUNTS

(2) That additional grounds for suspension or revocation under Section 24200 (a) (b) (—), Business and Professions Code, exist in that respondent(s) have violated, or permitted the violation of:

(a) Business and Professions Code Section(s) 24862—Counts I & II; 24871—Count III

(b) Title IV, Cal. Admin. Code, Rule(s) 101—Counts I & II

(c) Other law: .....

You may, but need not be, represented by counsel at any or all stages of these proceedings.

WHEREFORE, I recommend that a hearing be held on this accusation.

Dated this 11th day of December, 1978.

/s/ KERMIT Q. GREENE
Department of Alcoholic
Beverage Control

Reviewed; /s/

**Exhibit D**

No. 51,428

COLBY DISTRIBUTING CO., INC. et al.,
*Appellee,*

v.

MICHAEL C. LENNEN, et al.,
*Appellant.*

Appeal from Shawnee district court, division No. 2; Michael A. Barbara, judge. Reversed in part, affirmed in part. Opinion filed November 14, 1979.

Robert E. Duncan, II, assistant attorney general, argued the cause and Alan F. Alderson, general counsel, John P. Quinlin and David A. Wright, all of the Kansas Department of Revenue, were with him on the brief for the appellants.

Terry G. Paup, of Wichita, and James W. Sargent, of Sargent, Klenda, Haag & Mitchell, of Wichita, argued the cause and Donald Patterson, of Fisher, Patterson, Sayler & Smith, of Topeka, was with them on the brief for the appellees Grant-Billingsley Wholesale Liquor Co., et al.

Robert C. Foulston, of Foulston, Siefkin, Powers & Eberhardt, of Wichita, argued the cause and was on the brief for the intervenor Standard Liquor Corporation.

Payne H. Ratner, Jr., of Ratner, Mattox, Ratner, Barnes & Kinch, P.A., of Topeka, argued the cause and Jim J. Marquez, of Topeka, was with him on the brief for the intervenor Kansas Retail Liquor Dealers Association.

Reid F. Holbrook, of Steineger & Holbrook, P.A., of Kansas City, argued the cause and was on the brief for intervenors Sunflower Sales of Topeka, A-B Sales Co., Inc. and Eastern Distributing Co., Inc.

Patrick L. Connolly, assistant district attorney, argued the cause and Vern Miller, district attorney, and Stuart W. Gribble, assistant district attorney, were with him on the brief for the intervenor State of Kansas, ex rel. Vern Miller.

The opinion of the court was delivered by

Herd, J.: After giving the matter due consideration we hold, by a unanimous court, Chapter 153 of the 1979 Session Laws of Kansas, House Bill 2020, to be constitutional in toto, reversing in part and affirming in part the judgment of the trial court.

This abbreviated opinion announcing the decision of the court will be supplemented by a formal opinion to be filed when it is prepared.

Fromme, J., not participating.

## Exhibit E

Sacramento, California, Monday, November 20, 1978,
9:50 A.M.

Senator Foran: I am going to call this meeting to order at the request of Senator Dills' office. Senator Dills has been detained, but he should be here in a little while as we understand it.

I will begin by reading an opening statement that has been prepared by Senator Dills, and I'll read it on his behalf.

AB 935, the Alcoholic Beverage Unfair Practices Act, was heard and approved by this Committee on August 7, 1978. At a later date, the measure was re-referred to this Committee by the Senate Finance Committee for an interim study.

AB 935 was introduced in response to a ruling of the California Supreme Court on May 30, 1978, when the Court found in the case of Baxter Rice -vs- Alcoholic Beverage Control Appeals Board that Section 24755 of the Business and Professions Code violated the Sherman Antitrust Act.

Section 24755 required that a manufacturer or brand owner of alcoholic beverages file a minimum price schedule for distilled spirits with the Department of Alcoholic Beverage Control, and prohibied an off-sale retail licensee from selling below that posted price.

AB 935 seeks to meet the objections of the California Supreme Court to the old "fair trade" law by establishing a minimum retail price for alcoholic beverages, based upon the cost to a retailer plus a percentage markup to reflect the retailers' necessary expenses.

• • •